In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1803

SOUTHWEST KENWORTH, INC.,
an Arizona corporation, Petitioner,

v

ARIZONA STATE TAX COMMISSION,
a body corporate and politic, and
JOHN M. HAZELETT, WALDO L. DEWITT, and BOB KENNEDY,
as members of and constituting said Arizona Tax Commission,
and THE STATE OF ARIZONA, Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona Division One

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June 17, 1977

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and THE STATE OF ARIZONA, Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona Division One

The Petitioner, Southwest Kenworth, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Arizona, Division One, entered in this proceeding on January 4, 1977.

OPINION BELOW

The opinion of the Court of Appeals, reported at ..... Ariz. App. ....., 561 P.2d 757 (1977), appears in the Appendix

hereto at page 1. The Amended Judgment of the Superior Court of Maricopa County, filed October 16, 1974, is also included in the Appendix, at page 25.

JURISDICTION

The judgment of the Court of Appeals of the State of Arizona, Division One, (Appendix, *infra,* page 1) was entered on January 4, 1977. A motion for rehearing was denied on February 18, 1977. On March 22, 1977, the Supreme Court of Arizona denied Southwest Kenworth's petition for review and this petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Do the commerce and due process clauses of the United States Constitution prohibit the imposition of Arizona's unapportioned transaction privilege tax, measured by gross receipts, on the interstate transactions of a company incorporated and doing other business within Arizona?

(2) What objective factors will sustain a finding that a particular business transaction is so dissociated from a taxpayer's local business activities as to be interstate in nature and not subject to Arizona's unapportioned transaction privilege tax?

STATUTES INVOLVED

At all times material herein, Arizona Revised Statutes § 42-1312(A) provided as follows:

> The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two percent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. . . .

A.R.S. § 42-1301(11) defines a sale as:

> Any transfer of title or possession, or both, exchange, barter, lease or rental, conditioned or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration. . . .

A.R.S. § 42-1321(A) provides in pertinent part:

> This article shall not apply to:
>
> * * *
>
> 4. Sales in interstate or foreign commerce when prohibited from being so taxed by the constitution of the United States or the constitution of this State.

STATEMENT OF THE CASE

Petitioner, Southwest Kenworth, Inc., is an Arizona corporation, with its principal place of business in Phoenix, Arizona, and offices in New Mexico, Utah, Nevada and Texas. During the years pertinent herein, Southwest Kenworth was a franchise dealer for K. W. Dart, a Kansas City, Missouri truck manufacturer, and was engaged in the sale, distribution and servicing of heavy equipment. Approximately 45 per cent of its business consisted of sales of off-highway vehicles to various mines. Between 1966 and 1969, Petitioner did business in Arizona, New Mexico, Utah, Nevada, Idaho and Texas and averaged $13-$14 million in annual gross income, on which Petitioner paid approximately $500,000 in taxes to the State of Arizona over this period. In 1966, Southwest Kenworth had approximately 100 employees, 50 of whom were located in Arizona.

During 1965, Petitioner learned that American Smelting and Refining Company (ASARCO) and Kennecott Copper Corporation, both companies with corporate headquarters and purchasing offices in New York and mining operations in Arizona, were in need of new ore-hauling vehicles for use in their Arizona mines. Since these trucks must be specially designed for the particular pit in which they will be used, technical employees of

Southwest Kenworth met with personnel from each of the mines in Arizona to work out specifications for the trucks. The president of Southwest Kenworth testified that Petitioner's competitors in these two transactions were an Illinois and an Oklahoma corporation, both of whom would have dispatched personnel to the Arizona mine sites of ASARCO and Kennecott, just as petitioner did, to develop specifications for the desired vehicles.

Thereafter, invitations for bids were issued from the New York offices of ASARCO and Kennecott. Both before and after the invitation for bids, Southwest Kenworth's president made numerous trips to New York to negotiate with ASARCO and Kennecott regarding these sales, as well as to the Kansas City manufacturing plant of K. W. Dart to discuss pricing of the trucks. Eventually, Petitioner hand-delivered bids to ASARCO and Kennecott in New York City where, in both cases, Petitioner was orally informed of the acceptance of its bid. Both ASARCO and Kennecott later mailed purchase orders confirming the contract to Petitioner's office in Arizona.

ASARCO ordered a fleet of thirty-nine 85-ton dump trucks; Kennecott ordered eleven trucks. After their manufacture in Kansas City by K. W. Dart, several of the trucks were fully assembled. Both ASARCO and Kennecott sent mechanics to Kansas City to inspect the trucks. Once approved, the trucks were dismantled for shipment, which was "f.o.b. Kansas City" in both cases; that is, ASARCO and Kennecott paid for transportation and insurance from Kansas City, where title and possession passed to the purchasers. Petitioner billed the purchasers on the same day the trucks were delivered to the carrier for shipment.

Petitioner paid no privilege tax on these transactions at the time. However, in April of 1969, as a result of an audit of Petitioner's records for the period from April 1, 1966 through January 31, 1969, Respondents made an additional assessment against the Petitioner in the amount of $185,413.44, of which $177,387.41 was attributable to the above transactions. Petitioner's hearing

before the tax commission, held pursuant to A.R.S. § 42-1338(A), resulted in denial of Petitioner's request for reduction of the assessment. Thereafter, on July 26, 1971, Petitioner paid $185,-366.38 under protest, pursuant to A.R.S. § 42-1339(B). The balance was paid without protest.

Simultaneously, Petitioner filed suit for refund in the Superior Court of Maricopa County, Arizona, pursuant to A.R.S. § 42-1339(B). After trial before an advisory jury on May 23 and 24, 1973, the court held as a matter of law that both the sale and the taxable event occurred outside Arizona and were, therefore, interstate in nature and not subject to Arizona's transaction privilege tax.

Respondents appealed the case to the Arizona Court of Appeals, which reversed. Relying on *Arizona State Tax Commission v. Ensign,* 75 Ariz. 220, 254 P.2d 1029 (1953), the court held that the incident of the Arizona tax is not the sale itself, but rather the privilege of engaging in business within the State. Therefore, per *Ensign,* Arizona may tax the gross proceeds of sales occurring outside Arizona if they result from business activities within the State.[1] Applying this formulation to the instant facts, the court deemed the imposition of the tax constitutional, since Petitioner had not shown the transaction to be "dissociated from its local business and interstate in nature."[2] The Court of

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1. Relying on subsequent decisions of the Arizona Court of Appeals, Petitioner argued below that the incidence of Arizona's privilege tax, A.R.S. § 42-1312(A), was properly the *sale* of property within the State, and not the taxpayer's business activities within the State. For purposes of this Court's review, Petitioner will accept the Arizona Supreme Court's interpretation in *Ensign* that the tax is levied not on the sale itself but on the privilege of engaging in business in Arizona.

2. While this Court will normally accept the State court's construction of its taxing statute, the Court is not bound by the State's determination of the constitutionality of the tax. "The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.'" *Memphis Steam Laundry Cleaners, Inc. v Stone,* 342 U.S. 389, 392 (1952).

Appeals denied rehearing and on March 22, 1977 the Arizona Supreme Court declined review.

The federal question here presented was first raised in Petitioner's original complaint which alleged that the disputed assessment violates the commerce, due process, and equal protection clauses of the United States Constitution. (Appendix, page 46.) On appeal, the due process and commerce questions were specifically argued in the briefs of both parties and resolved by the Court of Appeals in favor of Respondents.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Holdings in Evco v. Jones and American Oil Co. v. Neill, Which Are Applicable Herein.

Despite the large number of opinions by this Court dealing generally with State taxation of interstate commerce, including the most recent opinion in *Complete Auto Transit, Inc. v. Brady,* 45 U.S.L.W. 4259, the specific questions presented by this case remain unanswered. Indeed, as the Court carefully noted, *Complete Auto Transit* did not involve allegations that the activity taxed lacked a sufficient nexus with the taxing State, that the tax discriminated against interstate commerce, that it was unfairly apportioned or that it was unrelated to services provided by the State, 45 U.S.L.W. at 4260. In contrast, these allegations are the essence of Petitioner's claim herein.

In fact, however, it is not so much the absence of decisions on point as it is the confusion and inconsistency among existing decisions which warrant the Court's consideration of the present case. The existence of conflicting decisions is engendering needless litigation, producing inconsistent adjudications, and causing frustration for all parties concerned. This case offers a vehicle for the Court to resolve some of these disparities, by identifying those earlier decisions which the Court deems of continuing vitality, clarifying and elaborating the guiding principles enunci-

ated in those cases, and articulating, as against the facts here presented, the constitutional limitations on a State's power to tax gross receipts from the purely interstate business of a local corporation.

In the proceedings below, Petitioner relied heavily on this Court's opinion in *Evco v. Jones,* 409 U.S. 91 (1972) which concerned New Mexico's Emergency School Tax and Gross Receipts Tax. The tax was levied on certain contracts, negotiated and entered into outside New Mexico, under which Evco created within the State a finished product which it delivered to its out-of-state clients. In a per curiam opinion this Court declared the tax unconstitutional in unequivocal language:

> [A] State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another State. . . . But a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce. 409 U.S. at 93.

By its terms, *Evco* should operate here to prevent imposition of the Arizona tax. There is no dispute that this case involves a sale of tangible personal property outside Arizona. Petitioner had even less contact with Arizona than Evco did with New Mexico, since in the instant case, Petitioner did not manufacture the subject property within the taxing State. It is immaterial that Petitioner knew the goods were intended for eventual use within Arizona. *American Oil Co. v. Neill,* 380 U.S. 451, 457 (1965).

The cases cited in *Evco, Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1939), and *J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938), are equally pertinent here. Both involved unapportioned taxes on gross receipts derived from interstate commerce, and in both cases, the taxes were invalidated on commerce clause grounds, as directly burdening interstate commerce through the risk of multiple taxation, a risk to which intrastate

commerce is not exposed. As stated in *Gwin, White & Prince, Inc.*:

> Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the State. If Washington is free to exact such a tax, other States to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co. v. Storen,* [304 U.S. at 310-311]; . . . . 305 U.S. at 439.

The Arizona Court of Appeals made a feeble and unconvincing attempt to distinguish Arizona's transaction privilege tax, measured by the taxpayer's unapportioned gross receipts, from the taxes in *Evco* and *J. D. Adams Mfg. Co., supra,* which it characterized as taxes "on *gross sales* of the corporations without regard to the interstate aspects of the business." (Appendix, page 10.) The distinction, if one exists, must surely be a distinction without a difference.

The case most precisely analogous to the instant case is *American Oil Co. v. Neill,* 380 U.S. 451 (1965) in which this Court struck, as violating due process, Idaho's excise tax on fuel sold outside the State for importation into Idaho, where the incidence of the tax fell on the licensed Idaho dealer. In *American Oil,* the invitation, submission, and acceptance of bids occurred outside Idaho, as did the delivery and passage of title. Moreover, the Court found no indication that the company's other activities contributed to the procurement or performance of the contract. And, as noted above, the Court discounted the fact that the vendor knew the fuel would be imported into Idaho.

Similarly, in the case at bar, the invitation, submission and acceptance of bids occurred outside Arizona, as did the manufacture, delivery and transfer of title. Likewise, there was no indication that Petitioner's other activities in Arizona had any bearing on the procurement or performance of the subject contracts. Petitioner's competitors for these particular contracts were out-of-state companies, Westinghouse Air Brake of Peoria, Illinois, and Unirig Company of Tulsa, Oklahoma, attesting to the purely interstate nature of the transaction. Under the circumstances, Petitioner's incorporation and other activities in Arizona were entirely coincidental.

In its opinion, the Arizona Court of Appeals relied upon this Court's decisions in *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951); *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); and *Standard Pressed Steel Co. v. Department of Revenue,* 419 U.S. 560 (1975). In each of these cases, the Court upheld a tax imposed upon sales within the taxing State by a foreign seller who had entered the State to do business. In each case, the Court found the sales sufficiently related to the local activities of the out-of-state corporation to justify imposition of the tax. The Arizona court relied on language from these opinions to sustain the tax below without acknowledging the different factual context in which these cases arose. The questions surrounding a State's ability to tax a foreign corporation coming into the State to compete for local business are inherently different from the issue of whether a local corporation doing a substantial intrastate business can ever simultaneously conduct a purely interstate business, beyond the reach of the State's taxing power. The taxes upheld in *Norton, General Motors,* and *Standard Pressed Steel* also differed from the one contested here in that each of those taxes was, in the Court's estimation, directly and proportionally related to the taxpayer's activities within the taxing State.

The broad issue posed by this case, as noted above, is whether a state may constitutionally tax receipts from every transaction entered into by a company which does business within that state, simply by virtue of its presence in the state, or whether, instead, transactions which are truly interstate in character should not be taxable. Stated differently, should an unapportioned tax on the privilege of doing business within a state permissibly extend to the conduct of inter- and intrastate business alike? Implicit in this formulation are the two sub-issues which underlie Petitioner's objection to the levy of Arizona's privilege tax here.

First, Arizona had insufficient contacts with this transaction to justify the imposition of its tax. For a state to tax any transaction, due process first requires that the State show a sufficient "nexus between such a tax and transactions within a state for which the tax is an exaction." *General Motors Corp. v. Washington, supra,* 377 U.S. 436 at 449-50 (Brennan, J., dissenting), quoting *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 464 (1959).

Here, all preliminary negotiations, the invitation, submission, and acceptance of bids, formation of the contract, manufacture, inspection, and delivery of the trucks, the transfer of title and therefore the sale itself[3] all occurred outside the state. In-state activities were limited to an early meeting of technical personnel to develop specifications for the trucks, which necessarily occurred at the mines where the trucks would be used, and the purely administrative functions of mailing invoices to the purchasers once delivery was effected and receiving the buyers' purchase orders and eventual payment in Petitioner's Phoenix office. The meeting to devise specifications would have occurred wherever

3. A.R.S. § 42-1301(11) defines a sale as "[a]ny *transfer of title or possession, or both,* exchange, barter, lease or rental, conditioned or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, ..." (Emphasis added.)

the trucks were to be used; that they were destined for use in Arizona was purely fortuitous, and irrelevant for purposes of a due process analysis. *American Oil Co. v. Neill, supra.*

Second, even if there had been sufficient contacts with Arizona to justify taxing this transaction, Arizona's transaction privilege tax, measured by the taxpayer's total gross receipts, is not restricted in its application to those proceeds attributable to Petitioner's activities within Arizona. Both the due process and commerce clauses require that a state exert its taxing power only in proportion to activities within its borders. Otherwise, every state which commerce touches could lay a tax measured by the entire volume of that commerce, producing a cumulative and discriminatory effect on interstate commerce. *General Motors Corp. v. Washington, supra,* 377 U.S. at 440; *Gwin, White and Prince, Inc. v. Henneford, supra,* 305 U.S. at 439. As Justice Brennan observed in his dissent in *General Motors Corp., supra,* 377 U.S. at 450-51:

> [F]ar more common in our complex economy is the kind of sale presented in this case, which exhibits significant contacts with more than one State. In such a situation, it is the commercial activity within the State, and not the sales volume, which determines the State's power to tax, and by which the tax must be apportioned. . . . [I]f commercial activity in more than one state results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing state.

It should also be noted that the possible burden on interstate commerce is especially great where, as here, the tax is based on gross receipts, rather than net income, since the former is payable regardless of whether the taxpayer's operations are profitable, a factor this Court has considered in assessing relative burdens

on interstate commerce. *See Northwestern States Portland Cement Co. v. Minnesota* and *T. V. Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 466 (1959) (Harlan J., concurring); *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 327-29 (1918). If taxation measured by gross receipts is to be constitutional, the *sine qua non* is that it be fairly apportioned. *General Motors Corp. v. Washington, supra*, 377 U.S. at 440.

Finally, Petitioner submits that even if one accepts as correct the Arizona court's pronouncement that "Arizona may, without unduly burdening interstate commerce, tax all revenue that is the *result* of business activities within the state," the Court has clearly misapplied its own test. By either a quantitative or qualitative measure, it should be clear that the "substantial business activities" occurred in New York and Missouri, not in Arizona. Ironically, this misapprehension well illustrates the error of the court's claim that its formulation obviates any risk of multiple taxation "because only the State where the substantial business activities occurred can tax the sale proceeds." (Appendix, page 10.) In so stating, the Court apparently presumes that for any given transaction, the "substantial business activities"—which it nowhere attempts to define—will always be confined to a single state, an assertion not substantiated by modern commercial realities. Since every other state can just as readily declare that the "substantial business activities" surrounding any transaction occurred there, the potential for multiple taxation is self-evident.

In light of the complexity of the problem of fairly apportioning the tax base of interstate transactions among the affected states and the continuing failure of Congress to legislate a comprehensive solution, Petitioner submits that a simple and effective answer would be to allow taxation of interstate transactions only by the State where the sale occurs. Since the actual sale, unlike the "business activities surrounding the sale," can only occur in a single place, such an approach would effectively eliminate the

possibility of multiple taxation by every state with some connection to the transaction. All that would be required to implement such a solution is a uniformly applicable definition of the place of sale.

2. This Case Presents Important and Recurring Questions Concerning the Permissible Limits of State Taxation of Interstate Commerce.

No person or body is perhaps better aware of the important and recurring nature of questions concerning state taxation of interstate commerce than this Court. The volume of cases already decided and the many others in which review is sought attest to the significance of these complex issues, the frequency with which they arise, and the urgent need for their resolution.

Not only could a definitive pronouncement by this Court eliminate much needless litigation and prevent unfair and inconsistent results below, but it would provide much-needed guidance for affected parties on both sides of this troubling question.

As a practical matter, businesses must be able to predict the tax consequences of their commercial dealings. Here, for example, the amount of the unexpected tax effectively negated Petitioner's profit on these transactions. Thus, when quoting a price or submitting a bid, it is essential that the business be able to anticipate the taxes it will incur, particularly where the amount of tax involved is substantial and where the taxpayer has a choice of several states in which to transact its business.

This case also illustrates the inequity of allowing Arizona to tax these particular transactions and the concomitant effect on interstate commerce. As noted earlier, Petitioner's competitors here were out-of-state corporations which would in all likelihood not be subject to Arizona's privilege tax and could therefore substantially underbid Petitioner. To sustain this local tax on Petitioner's interstate business would significantly impair the ability of Petitioner and others similarly situated to compete in

interstate commerce, in contravention of both commerce clause and due process guarantees.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals of the State of Arizona, Division One.

Respectfully submitted,

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June 17, 1977

Appendix A

Division 1
Court of Appeals
State of Arizona
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In the Court of Appeals
State of Arizona

DIVISION ONE

Arizona State Tax Commission, a body corporate and politic, and John M. Hazelett, Waldo L. DeWitt and Bob Kennedy, as members constituting said Arizona Tax Commission and The State of Arizona, Appellants, v. Southwest Kenworth, Inc., an Arizona corporation, Appellee.	1 CA-CIV 2996 DEPARTMENT B

OPINION

An Appeal from the Superior Court of Maricopa County

Cause No. C-250816

The Honorable Roger G. Strand, Judge

REVERSED

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W R E N, Acting Presiding Judge

This appeal concerns the applicability of the Transaction Privilege and Education Excise Tax, Title 42, Ch. 8, Art. 1, Arizona Revised Statutes, to the sale of certain off-highway vehicles by the appellee, Southwest Kenworth, Inc. (Kenworth). However, before reaching the merits of the tax question we must consider appellant's contention that the trial court erred in treating the verdict of the jury as advisory only.

The action is one at law and not equity and was scheduled for trial to a jury. Yet in a pretrial conference with the trial judge, appellee's attorney stated that the jury was to be an advisory one. Appellant admittedly failed to comment on or object to this assertion by appellee and characterized his own conduct as amounting to "passive acquiescence" insufficient to constitute a waiver of his right to trial by jury, citing Rule 39A, Arizona Rules of Civil

Procedure, 16 A.R.S. Rule 39A requires that when a jury has been demanded the jury will try the issues unless both parties stipulate in open court or in writing that the case may be tried to the court. Appellant notes that no such stipulation appears in the record and argues that he was deprived of his right to a jury trial because the verdict and answers to the special interrogatories submitted were considered by the court as being advisory only, in that the judgment rendered by the court was contra to the verdict of the jury.

We would agree that treating the verdict and interrogatories of the jury in a non-equity case as being advisory only would, when properly objected to, amount to a denial of the right of trial by jury. However, the facts here reflect implicit consent by appellant that the jury act solely in an advisory capacity and Rule 39A is therefore inapplicable.

Contrary to the apparent suggestion by appellant, trial by an advisory jury is still a trial by jury. In an equity case the jury is always advisory yet this has been held to be sufficient to afford the parties the right to a jury trial. *Stukey v. Stephens,* 37 Ariz. 514, 295 P. 973 (1931); *Mozes v. Daru,* 4 Ariz.App. 385, 420 P.2d 957 (1966).

The central question before us on this issue is whether the trial court acted properly in using the jury in an advisory capacity. As a general rule the verdict of the jury and answers to special interrogatories are binding on the court when the action is one at law, but are only advisory and not binding upon the court in an equitable proceeding. *Bohmfalk v. Vaughan,* 89 Ariz. 33, 357 P.2d 617 (1960). However, we have found no authority nor has any been cited to us which would prohibit the parties and the court from agreeing to and using such a jury in a non-equity case. We believe that the record here shows that there was an implicit understanding that the jury would be advisory and the appellant is estopped from arguing to the contrary. *See Mozes v. Daru,*

supra; Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951). The record reflects not only appellant's admission that the fact that the jury would be advisory was mentioned in chambers prior to trial, but also that special interrogatories which were to be answered "Yes", "No", or in some instances, "Undecided" were submitted to the jury without objection from appellant. Although a general verdict was also submitted, such a verdict is not inconsistent with the advisory nature of the jury. Cf. *Merryweather v. Pendleton,* 90 Ariz. 219, 367 P.2d 251 (1961). Moreover, even though the appellant received a favorable verdict, its counsel, after the return thereof, submitted a form of judgment to the court which awarded only the jury fees and did not purport to render judgment on the merits. Trial memoranda were thereafter submitted by both parties and appellant's memorandum contained this statement:

> "The ultimate question to be decided at the present time is whether or not the plaintiff, Southwest Kenworth, Inc. is entitled to a refund . . . ."

We believe this statement tacitly admits that the ultimate question of taxability was still to be decided despite the jury's verdict.

Oral arguments were heard after the trial memoranda were submitted and in a minute entry order of July 9, 1974 more than 13 months after the jury verdict, judgment was rendered in favor of appellee. Proposed findings of fact and conclusions of law were submitted by appellee, and in a memorandum in opposition thereto, appellant for the first time asserted that the verdict of the jury was binding on the court. Under the circumstances, principles of estoppel preclude this issue being raised, and the facts show implicit consent to an advisory jury.

Turning to the tax question itself, the pertinent facts are as follows:

Kenworth is an Arizona corporation engaged in the business of selling heavy-duty trucks and off-highway vehicles. It is a franchise dealer for K.W. Dart, a Kansas City truck manufacturer. In addition to sales of vehicles, Kenworth also maintains a parts and service department located in Arizona.

Sometime in 1965, Kenworth became aware that American Smelting and Refining Co. (ASARCO) and later that Kennecott Copper Co., two mining companies with corporate headquarters in New York, were in the market for some new vehicles for use in their Arizona mines. Technical employees from Kenworth and from the mines met in Arizona to work out specifications for the vehicles. Kenworth's president then entered a series of negotiations with the corporate officers in New York and there he submitted a bid for the conract. Kenworth was orally informed in New York that its bid had been accepted, and the actual purchase orders were later received in Arizona.

When the vehicles were completed they were shipped by K. W. Dart to the purchasers f.o.b. Kansas City. Invoices were sent by Kenworth when the vehicles were shipped and payment was received in Arizona. The risk of loss passed at the f.o.b. point to the purchaser, but final inspection and acceptance was to occur in Arizona, the destination point.

The trial judge concluded as a matter of law that the sale occurred outside Arizona; that the taxable event occurred outside Arizona; that the transactions were therefore interstate in nature and not subject to the Arizona transaction privilege tax.

The first issue that must be addressed is whether the sale must take place in Arizona for the transaction to be taxable. The applicable statute, A.R.S. § 42-1312A, provides, inter alia:

> "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing *within this state*

in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from: . . ." (Emphasis added.)

It has been firmly established that this tax is not one levied on the sale itself but on the privilege of engaging in business in Arizona, measured by the gross receipts from sales. *Arizona Department of Revenue v. Mountain States Telephone and Telegraph Co.*, ... Ariz. ...., ... P.2d .... (No. 12636 filed Nov. 3, 1976); *Tower Plaza Investments, Limited v. DeWitt,* 109 Ariz. 248, 508 P.2d 324 (1973); *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 226 P.2d 549 (1951). The taxable event is the engaging in *business* within the state. *Arizona State Tax Commission v. Ensign,* 75 Ariz. 220, 254 P.2d 1029 (1953).

A factual situation similar to the instant case was present in *Arizona State Tax Commission v. Ensign, supra.* The appellee was the exclusive dealer for an out-of-state manufacturer of pumps. The transactions upon which the controversy arose concerned the assessment of the privilege tax to the sale of pumps to certain large Arizona companies who did their own installation work and repairs. Orders for pumps were placed with appellee who forwarded them to the manufacturer. The manufacturer delivered them f.o.b. Los Angeles directly to the Arizona user and payment was made to appellee.

The applicable statute provided that the tax would be levied on "the gross proceeds of sales at gross income from the business upon every person engaging or continuing *within this state* in the following businesses: . . ." (Emphasis added.) A.R.S. § 73-1303(c), Excise Revenue Act of 1935. The Court, in interpreting the language of the statute specifically noted:

> "[T]he 2% rate upon the applicable indicia, 'gross proceeds of sales or gross income', [is] without a limitation to sales made 'in the state'.

"Had the legislature intended to measure the tax by sales made only in Arizona it would doubtless have included in subsection (c) 1 the phrase 'in the state' or 'in this state', as it did in the business of transmitting long distance messages by telephone or telegraph, or of transporting for hire freight or passengers by motor vehicle or railroad, or of transporting products such as oil or gas in pipes or conduits where the transmission or movement is between points 'in this state'. Also, where the transmissions or movements are through the state or between a point inside and a point outside the state, the tax is 'imposed only upon such part of such business as is transacted or performed within the state'. See the case of Standard Oil Co. v. Dept. of Finance, 383 Ill. 136, 48 N.E.2d 514, 516, where the facts required the court to construe a statute similar to ours before and after an amendment. Prior to the amendment the act read in part:

> " 'A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three percent (3%) of the gross receipts from such sales in this State * * *.'
>
> The amendment omitted the words 'in this State' where they appear the second time. The court held that as amended 'The omission of the words "in this State" in the amendatory act removes the limitation, as to the location where the sales must occur, that the gross receipts can be used for computing the tax.' " (75 Ariz. at 224, 254 P.2d at 1031).

The Court went on to uphold the assessment of the tax upon these sales. Although the sale technically took place in California due to the constructive delivery and transfer of title from shipment f.o.b. Los Angeles, the *Ensign* Court held that the gross proceeds of these sales may be taxed because they resulted from business activities in Arizona.

However, in *Goodyear Aircraft Corporation v. Arizona State Tax Commission,* 1 Ariz.App. 302, 402 P.2d 423 (1965), the Court of Appeals framed the issue before them in this way:

> "The question presented is whether the sales were made within the State of Arizona, and therefore taxable . . . . or whether the sales were made either outside the State of Arizona or in interstate commerce. In either of these latter events the plaintiff would not be subject to the tax." Id. at 304, 402 P.2d at 425.

The only Arizona connections to the transaction were that Arizona was the place of manufacture and the product was shipped f.o.b. Litchfield Park, Arizona.

The court's analysis noted that the f.o.b. point was not in and of itself controlling as to the place of sale. The court also considered that final inspection and acceptance, delivery, and payment all took place outside the state, in Lakehurst, New Jersey. The Court concluded that title transferred and therefore the sale took place in New Jersey. The Court held that:

> "Since the sale did not occur in the State of Arizona, the transaction is not subject to the Arizona tax for the reason that A.R.S. § 42-1312, subsec. A imposes a tax only upon those '. . . engaging or continuing *within the state* in the business of selling any tangible personal property whatever at retail . . .' (Emphasis supplied.)" Id. at 305, 402 P.2d at 426.

This decision in *Goodyear* was reached without citation to any authority other than the taxing statute and without any reference to or discussion of *Arizona State Tax Commission v. Ensign, supra.* The cases are clearly conflicting, and while we believe the *Goodyear* Court reached the right conclusion, its analysis was misdirected. The focus under the *Ensign* case and the statute is on the *business activity* in the State and not upon the sale itself. In *Goodyear,* the business activity surrounding the sale occurred almost entirely outside Arizona and was therefore not subject to the privilege tax. The technical location of the transfer of title[1] is

only one factor to consider in assessing whether the transaction was a result of business activities in the state.

A review of several United States Supreme Court cases confirms our view that the proper focus is on the business activities surrounding the sale and that the sale need not necessarily occur in the taxing state to be constitutionally imposed. In *Gwin, White & Prince v. Henneford,* 305 U.S. 434, 59 S. Ct. 325 (1939), the Supreme Court struck down a Washington privilege tax measured by the gross receipts from the business of marketing fruit shipped from Washington to the places of sale. The tax was found to unduly burden interstate commerce not because the sale was made out-of-state but because "[a] substantial part of it (the interstate commerce service) is outside the state where sales are negotiated and written contracts of sales are executed, and deliveries and collections made." Id. at 438, 59 S. Ct. at 327. The determinative factor was the interstate business activities and not the mere fact of an out-of-state sale.

In *Norton Co. v. Department of Revenue of State of Ill.,* 340 U.S. 534, 71 S. Ct. 377 (1951), a privilege tax was upheld in a situation similar to *Arizona State Tax Commission v. Ensign, supra.* Illinois was held to have the power to include the gross proceeds from sales made f.o.b. Massachusetts to Illinois residents where the orders were placed through the Chicago office of the Massachusetts company.

Idaho's attempt to tax gasoline sales made in Utah for use in Idaho was found to violate the Due Process Clause of the Constitution in *American Oil Co. v. Neill,* 380 U.S. 451, 85 S. Ct.

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1. A.R.S. § 42-1301(11) defines "sale":
   "11. 'Sale' means any *transfer of title* or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes:" (Emphasis supplied.)

1130 (1965). The Court implicitly recognized the possibility of taxing an out-of-state sale by noting that a corporation can exempt itself from paying the privilege tax by showing that there were no in-state activities connected with the out-of-state sales and thereby dissociate those transactions from its local business. The Supreme Court held the transaction outside the permissible scope of the privilege tax because all business activities leading up to the sale occurred outside the taxing state.

Finally, the appellee argues that *Evco v. Jones,* 409 U.S. 91, 93 S. Ct. 349 (1972), mandates that the sale take place within the state to be constitutionally taxed by that state. However, in *Evco* and in the case relied upon in *Evco, J. D. Adams Mfg. Co. v. Storen,* 304 U.S. 307, 58 S. Ct. 913 (1938), the tax imposed was a tax on *gross sales* of the corporations without regard to the interstate aspects of the business. Such a tax places an impermissible burden on interstate commerce because it could be levied by the state of manufacture as well as by the state of sale. This burden is not present in the transaction privilege tax because only the state where the substantial business activities occurred can tax the sale proceeds. The fact that the actual place of sale was outside the taxing state does not preclude taxation.

From the foregoing it is clear that under the Constitution and the Arizona statute, there is no requirement that the sale occur in Arizona before the transaction privilege tax may be imposed. Instead, the business activities which surround the sale must occur in Arizona before the assessment of the tax is permitted.

In the case sub judice, the sale of the trucks involved Kenworth's business activities both within and without the state. The United States Supreme Court in evaluating such cases has sought to strike a balance between two conflicting principles; that interstate commerce must be protected from undue interference from state taxation but that the commerce clause was not intended to allow such commerce to avoid paying its way. *Arizona State Tax Commission v. Ensign, supra; B. F. Goodrich Co. v. State,* 231 P.2d 325 (Wash. 1951). Arizona may, without unduly burdening interstate commerce, tax all revenue that is the result of business activities within the state. *Arizona State Tax Commission v. Ensign, supra.*

Where a corporation is doing business within a state and has submitted itself to the taxing power of that state, it can avoid taxation only by showing that the particular transaction is dissociated from its local business and interstate in nature. *Norton Co. v. Department of Revenue of State of Ill., supra.* If the tax is levied on the incidents of a substantial local business it is permissible. *General Motors Corp. v. Washington,* 377 U.S. 436, 84 S. Ct. 1564 (1964). The burden is on the taxpaper to show that the local business was not a decisive factor in capturing and holding the market and that the tax on the transaction burdens interstate commerce. *Standard Pressed Steel v. Washington Dept. of Revenue,* 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975); *General Motors Corp. v. Washington, supra; Norton Co. v. Department of Revenue of State of Ill., supra.*

As noted, Kenworth is an Arizona corporation with the majority of its employees located in Arizona. It maintains a parts and service division in Phoenix for the purpose of servicing equipment sold to customers after the expiration of the manufacturer's warranty. The company president testified that this parts and service constituted a vital part of Kenworth's business, and that parts representatives made regular visits to the mines. Additionally, during the pertinent time period, Kenworth's off-highway sales manager also regularly visited the mines to maintain a good relationship and to determine possible needs.

Regarding the specifics of the sales to Kennecott and ASARCO, the specifications for the equipment were worked out with mine personnel in Arizona, the vehicles were custom-made for use in each particular Arizona mine, purchase orders were accepted at

the Phoenix office and invoicing and payment went through the Phoenix office of Kenworth. In addition, final inspection and acceptance occurred at the mine sites. New York's connections with the transaction were that it was the place of contract negotiations, submission of bids and oral acceptance of Kenworth's bid. Initial inspection, constructive delivery and transfer of title and risk of loss occurred in Kansas City, Missouri.

Weighing the various factors, we can only conclude that the trial judge erred in finding that the taxable event occurred outside Arizona and that the sale was interstate in nature. The transaction involved the sale by an Arizona corporation to a New York corporation of equipment to be used exclusively at Arizona mines. There was a continuing relationship between the mine employees and Kenworth in that parts and service were provided by Kenworth personnel. The out-of-state activities were only incidental to Kenworth's business activities within Arizona. The service offered by Kenworth was admittedly significant in capturing and holding the market. The taxpayer has not shown any risk of multiple taxation nor any undue burden on interstate commerce resulting from the imposition of the Arizona transaction privilege tax. As a matter of law, we hold that the sales were a result of Southwest Kenworth's in-state business activities and, despite the interstate aspects of the transaction, it could still be constitutionally taxed.

The judgment in favor of Southwest Kenworth is reversed and judgment entered in favor of the State Tax Commission.

/s/ LAURANCE T. WREN
Laurance T. Wren,
Acting Presiding Judge

CONCURRING:

/s/ WILLIAM E. EUBANK
William E. Eubank, Judge

/s/ DONALD F. FROEB
Donald F. Froeb, Judge

Appendix B

Division 1
Court of Appeals
State of Arizona
Filed Jan 19 1977
Classie Gantt, Clerk

In the Court of Appeals
State of Arizona

DIVISION ONE

Arizona State Tax Commission, a body corporate and politic, and John M. Hazelett, Waldo L. DeWitt and Bob Kennedy, as members constituting said Arizona Tax Commission, and The State of Arizona, Appellants, vs. Southwest Kenworth, Inc., an Arizona corporation, Appellee.	1 CA-CIV 2996 DEPARTMENT B

MOTION FOR REHEARING

Pursuant to Rule 47(a), Rules of the Supreme Court of Arizona, Appellee, Southwest Kenworth, Inc., an Arizona corporation, respectfully moves the Court for a rehearing of that portion of the Court's decision which subjects the transactions between Kenworth, ASARCO and Kennecott to the Transactional Privilege and Education Excise Tax of Arizona for the reason the Opinion is contrary to the Due Process and Commerce Clauses of the United States Constitution, Arizona Revised Statutes and implicitly, overrules decisions of the Arizona Supreme Court.

This motion is supported by the following Memorandum of Points and Authorities which is incorporated herein by reference.

DATED this 19th day of January, 1977.

JONES, TEILBORG, SANDERS, HAGA & PARKS, P.C.

By DAVID L. HAGA
David L. Haga, Esq.
100 West Washington, Suite 1570
Phoenix, Arizona 85003

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is the most important Constitutional law cause relating to the Arizona Transactional Privilege and Education Excise Tax to come before the Arizona Courts in recent years. Its financial impact upon taxpayers of this State will be substantial since one of the fundamental rules of taxation known and adhered to by businessmen of this State has been judicially changed, subjecting out-of-state sales made by Arizona businesses to a major risk of double taxation. If the State of Arizona is going to adopt an unapportioned excise tax, it should do so by the legislative process to insure a Constitutionally sound system that includes known, ascertainable objective standards for application.

The present decision will foster litigation, frustrate commercial transactions, and subject every business activity involving out-of-state business contacts to the risk of multiple taxation. The consequence of the holding in this case will result in a system of taxation permitting a determination of the taxable event without quantitative or qualitative unallocated standards resulting from contacts or nexus between competing taxing jurisdictions.

I.

THE DECISION VIOLATES THE DUE PROCESS AND COMMERCE CLAUSES OF THE UNITED STATES CONSTITUTION

The Court's attention is once again directed to the following language from *EVCO v. Jones,* 409 U. S. 91, 93 S. Ct. 349, (1972);

> "But a tax levied on the gross receipts from the *sales* of tangible personal property in another State is an impermissible burden on commerce. In *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117

ALR 429, we rejected as unconstitutional a State's attempt to impose a gross receipts tax on the taxpayer's sales of road machinery to out-of-state customers.

'The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subject to the *risk of a double tax burden* to which intrastate commerce is not exposed, and which the commerce clause forbids'." (Emphasis added)

The distinction made by this Court in the Opinion of the *EVCO* case from the case *sub judice* is not legally sound. The United States Supreme Court made no distinction in *EVCO* between the "gross sales" tax and "transactional privilege" tax. It is just as constitutionally impermissive to impose a "transactional privilege tax" on sales made in interstate commerce as it would be if the tax would be measured by "gross sales", and the classification of the tax is irrelevant. As a matter of fact, *EVCO* cites *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 59 S. Ct. 325 (1939), which was a Washington "privilege tax" case and resulted in the same decision as *EVCO.*

The label of the tax is not determinative but the question to be decided is whether the tax places an impermissable burden on interstate commerce. To adopt a "business activity" test brings Arizona squarely in conflict with the Due Process Clause and the Commerce Clause of the United States Constitution in that it subjects all sales activity of a taxpayer to the risk of double taxation without apportionment even though major elements of a particular sale were disassociated from local contacts. *Norton Co. v. Department of Revenue of State of Illinois,* 340 U.S. 534, 71 S. Ct. 377 (1951) and *American Oil Co. v. Neill,* 380 U.S. 451, 85

S. Ct. 1130 (1965). Total disassociation is not possible and is not required. As stated in *American Oil, supra,* activities leading up to the sale and *not after* the sale are the facts to be examined. The adoption of a business activities test that includes post-sale conduct without prorata allocation of the tax burden is just as constitutionally unsound as the inclusion of all sales in the formula found in *EVCO.* If the central commercial factor of where the sale takes place is not persuasive in this State, there is present a "risk of a double tax burden" proscribed by the United States Constitution.

The present decision in this matter conflicts with the decision of the United States Supreme Court in the *American Oil* case, *supra.* The only distinguishing fact in the *American Oil* case from the case before this Court is that in *American Oil,* the bids were submitted from Utah instead of Idaho, the jurisdiction attempting to impose the tax. All other activities in that case leading up to the actual sale were out-of-state as in the instant case. For example, the invitation for bids in the *American Oil* case was issued out of Washington and in the Kenworth case from New York; the bids were accepted in Washington in *American Oil* and accepted in New York in this case; the contract offered delivery of gasoline f.o.b. Salt Lake City, Utah in *American Oil,* and the contract for the purchase of the off highway vehicles provided for delivery of the equipment f.o.b. Kansas City, Missouri and it was there that title passed.

The United States Supreme Court answers totally and completely the reliance by this Court on the fact that the off highway vehicles were destined for Arizona. The following language clearly reflects the insignificance of that fact:

"The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales, which were held to be insufficiently related to activities within the taxing State,

despite the fact that the vendor knew that the goods were destined for use in that State. Miller Bros. Co. v. Maryland, 347 U.S. 340, 98 L. Ed. 744, 74 S. Ct. 535 (use tax); Norton Co. v. Department of Revenue, 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377 (gross receipts tax); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023 (sales tax)." (emphasis added)

According to our analysis, ten (10) significant events occurred in connection with this sale or business activity outside of the State of Arizona as follows:

(1) Invitation to bid (New York);
(2) All negotiations leading to a contract (New York);
(3) Pricing of the equipment (Kansas City, Missouri);
(4) Place bids submitted (New York);
(5) Post-bid negotiations (New York);
(6) Consummation of transaction (New York);
(7) Point of delivery (f.o.b. Kansas City, Missouri);
(8) Inspection by purchaser (Kansas City, Missouri);
(9) Risk of loss on purchaser from Kansas City, Missouri
(10) Freight costs paid by purchaser from Kansas City, Missouri

Only three (3) events occurred in the State of Arizona, two of which were purely ministerial:

(1) Purchase order was sent from New York to Phoenix and returned to New York by seller;
(2) Invoices were sent from Phoenix to the purchasers
(3) Payment was received in the Phoenix, Arizona office.

Whether the test be one based upon quantitative factors or qualitative considerations, it is abundantly clear that this transaction resulted from interstate business activities by Kenworth and is not subject to local taxation under the United States Constitution.

II.

THE DECISION IN THIS CASE OVERRULES AN ESTABLISHED, WELL-RECOGNIZED ARIZONA REQUIREMENT IN THE FIELD OF TAXATION THAT THE PLACE OF SALE MUST BE IN ARIZONA

A.R.S. § 42-1301(11), which is in the definitional portion of the transactional privilege tax title, defines the word "sale". This was the definition that was in existence at the time taxpayer entered into the subject transaction and relied upon by Kenworth which, of course, it had the right to do. Nothing could be clearer than the words used in the definition of "sale" requiring the transfer of *"title or possession or both"*. Transfer of title and possession in the instant case as apparently agreed by this Court took place outside of Arizona. The uncontradicted testimony and evidence presented in this matter indicated that title passed in Kansas City, Missouri which, of course, this Court acknowledges. The possession, however, passed in Kansas City, Missouri also in that it was the purchasers (ASARCO and Kennecott) which sent their own representatives to Kansas City to inspect and accept the trucks. The risk of loss, insurance possession and control of the vehicles were on the purchasers from Kansas City. Kenworth did not assist in the reassembling of any of the trucks nor did it provide the warranty follow-up since that was done by the manufactuer, K. W. Dart. Any participation in a transaction after the transfer of title or possession or both involving the equipment purchased would have been a totally new business transaction between the parties.

This Court should not impliedly overrule the *Goodyear* decision since it reflected the correct law of the State of Arizona requiring the satisfaction of a two-pronged test to determine whether a transaction involving more than this jurisdiction is subject to taxation in this State. This Court twelve (12) years ago in *Goodyear* stated clearly, distinctly and correctly that "whether the

sales were made either outside the State of Arizona *or* in interstate commerce" was to determine the taxability of the particular transaction and if the transaction failed to meet either test, the sale was not taxable. If this Court is going to by implication overrule the *Goodyear* case, it must necessarily also overrule the following Arizona cases:

1. *Tower Plaza Investments, Limited v. DeWitt,* 109 Ariz. 248, 508 P.2d 324 (1973).
2. *CF&I Steel Corporation v. State Tax Commission,* 11 Ariz. App. 80, 462 P.2d 97.
3. *Arizona State Tax Comission v. Parsons-Jurden Corporation,* 9 Ariz. App. 92, 449 P.2d 626.
4. *Industrial Uranium Co. v. State Tax Commission,* 95 Ariz. 130, 387 P.2d 1013.

Each of the foregoing cases has held without equivocation that the measure of the tax are sales or business conducted in the State of Arizona which is the nexus to permit the Arizona taxing authority to assess the transactional privilege tax.

The Arizona Supreme Court in *Tower Plaza Investments, Limited v. DeWitt, supra,* stated:

> "The tax is not upon sales, as such, but upon the privilege or right to engage in business in the State, although measured by the gross volume of business activity *conducted within the State.*" (emphasis added)

Prior to the *Tower Plaza* case, the Arizona Supreme Court stated in *Industrial Uranium Co. v. State Tax Commission supra,* that:

> ". . . It is purely an excise tax upon the privilege or right to engage in business in Arizona measured by the gross volume of *business conducted within the state . . .*" (emphasis added)

Since the *Goodyear* case, this Court has had two opportunities to review the reasoning in that case and found nothing incorrect with the analysis of that decision.

Justice Cameron in *Arizona State Tax Commission v. Parsons-Jurden Corporation,* 9 Ariz. App. 92, 449 P.2d 626 (1969) continued the principle enunciated in *Goodyear* by stating:

> "And our courts have held that to be the subject of the Transactional Privilege Tax, the 'sale' must have taken place in *Arizona . . .*" (emphasis added)

One year later this Court in *CF&I Steel Corporation v. State Tax Commission, supra,* relying upon language from *Goodyear* stated that the tax is imposed upon only those that are engaging or continuing *within this State* the business of selling tangible personal property.

Too many decisions have been made by both this Court and the Arizona Supreme Court to now eliminate the requirement that the Courts and the taxpayers will no longer look to the place of sale to determine whether the proceeds are includable in the computation of the transactional privilege tax. Any change in the law if one is required should be made by the Arizona Legislature and there have been numerous legislative opportunities to correct the *Goodyear* decision if it was incorrect.

No better summary can be found in this instance than the last sentence of Opinion No. 67-6, dated February 6, 1967 by the Attorney General of the State of Arizona, where he opined:

> "Under A.R.S. § 42-1312, the tax applied if the sale occurs in Arizona and it does not apply if the sale occurs outside of Arizona."

That statement is not only what the law was when the transactions involved in this case were entered into and consummated, but it is also a correct statement of the Arizona law today. To undermine that principle by questioning but not expressly over-

ruling the rationale of the *Goodyear* case and other Arizona Supreme Court and Court of Appeal decisions on this matter is judicially unsound and fundamentally erroneous.

III.

IF THIS COURT IS GOING TO CHANGE THE ARIZONA LAW, IT SHOULD REMAND THIS CASE FOR A NEW TRIAL TO DETERMINE IF THE TRANSACTION RESULTED FROM BUSINESS ACTIVITIES IN THIS STATE AND WHAT BUSINESS ACTIVITIES SHOULD BE CONSIDERED

The uncontradicted testimony at the trial is that the sale could not have been made by Kenworth in the State of Arizona. Representatives of the Purchasers required by the location of their offices that the bids, negotiations, contracts and sales take place in the State of New York. Kenworth's competitors for these sales were Westinghouse Air Brake and Unit Rig located respectively in Peoria, Illinois and Tulsa, Oklahoma. This Court's holding requires an Arizona taxpayer who cannot obtain certain business locally and accordingly must deal in interstate activities to obtain that business, to be subject to a distinct economical tax disadvantage vis-a-vis competitors who are located outside of the State and come within the umbrella of interstate commerce. If the sale results from substantial business activities in interstate commerce, then logic mandates that the local taxpayer has disassociated its activities sufficiently to come within the privileges of the United States Constitution.

By the test established by this decision, the mere presence of the headquarters office in this State will subject every Arizona taxpayer to the transactional privilege tax regardless of where the transaction or sale took place. A business cannot operate in a paper vacuum so as to eliminate every single incidental contact with its principal place of business. The paperwork of bids, invoicing and

payment, of course, occurred in Arizona but these are purely administrative bookkeeping functions. The crux of the transaction, the negotiations, acceptance, title, possession, and sale as defined in Arizona occurred outside of Arizona, and as previously mentioned, Kenworth has *no* responsibility for final inspection or acceptance of the vehicles. The risk of loss was clearly on the Purchaser and any complaints that they may have had would not have been directed to Kenworth, but would have gone direct to the manufacturer and/or the common carrier.

This Court should not superimpose its judgment on what is incidental and what is consequential to a business transaction unless there is a judicial requirement that a seller can have absolutely no contact with its domiciliary State in interstate transactions.

Innumerable cases could be cited to this Court where the principle has been adopted that the Court will not unless clearly erroneous substitute its judgment or findings of fact for those of the trial court. To satisfy the bare minimum of judicial administration, if this Court has changed Arizona law by modifying *Goodyear* to eliminate consideration of place of sale, the matter should be remanded for a new trial so Kenworth could by other evidence, which was not needed at the first hearing relying upon the Arizona law as it then existed, show that the Purchasers did not place any significance or if so, how much, on the fact that Kenworth conducted other intrastate business activities in the State of Arizona.

CONCLUSION

For the reasons contained in this Motion, it is respectfully submitted that the order and decision filed in this matter should be vacated and the decision of the trial court affirmed.

RESPECTFULLY SUBMITTED this 19th day of January, 1977.

JONES, TEILBORG, SANDERS,
HAGA & PARKS, P.C.

By DAVID L. HAGA
David L. Haga, Esq.
Attorneys for Appellee

100 West Washington, Suite 1570
Phoenix, Arizona 85003

Copy of the foregoing
delivered this 19th day of
January, 1977, to:

James D. Winter, Esq.
Assistant Attorney General
338 State Capitol
1700 West Washington
Phoenix, Arizona 85007

DAVID L. HAGA
David L. Haga, Esq.

Appendix C

In The Superior Court of The State of Arizona
in and for The County of Maricopa

Southwest Kenworth, Inc., an Arizona corporation, Plaintiff, vs. Arizona State Tax Commission, a body corporate and politic and JOHN M. HAZELETT, WALDO L. DeWITT, and BOB KENNEDY, as members of and constituting said Arizona Tax Commission, and THE STATE OF ARIZONA, Defendants.	No. C 250816

AMENDED JUDGMENT

(Assigned to Hon. Roger G. Strand—Division 14)

The Court having heretofore made Findings of Fact, based in part upon the findings of a jury which had been empanelled for that purpose, and the Court having further made Conclusions of Law, to wit:

1. The sales of the subject equipment took place outside of Arizona;
2. The taxable event took place outside of Arizona;
3. The transactions sought to be taxed were interstate in nature.
4. The subject transactions are not subject to Arizona transaction privilege tax

and;

The Court determining that there is no just reason for delay in entering judgment as herein provided, and being further fully advised in the premises,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and hereby is granted to Plaintiff and that the Defendants, in accordance with A.R.S. § 42-1339, refund to the Plaintiff the sum of One Hundred Seventy-Seven Thousand Three Hundred Eighty-Seven and 41/100 ($177,387.41) Dollars, together with interest upon said sum at the rate of six percent (6%) per annum from July 26, 1971 until paid; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff be awarded its taxable costs herein.

DONE IN OPEN COURT this 15th day of October, 1974.

/s/ ROGER G. STRAND
Judge of Superior Court

Original lodged this 30th day
of September, 1974 with:
THE HONORABLE ROGER G. STRAND
Judge of Superior Court
Division 14
Maricopa County Courthouse
101 W. Jefferson
Phoenix, Arizona
and copy mailed this 30th day
of September, 1974 to:
DAVID L. HAGA, ESQ.
Dunn Jones Teilborg, Sanders,
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Phoenix, Arizona 85003
Attorney for Plaintiff
/s/
MARY Z. CHANDLER

EXHIBIT A

Appendix D

In The Superior Court of The State of Arizona
in and for The County of Maricopa

Southwest Kenworth, Inc., an Arizona corporation, Plaintiff, vs. Arizona State Tax Commission, a body corporate and politic, et al, Defendants.	No. C 250816

PLAINTIFF'S TRIAL MEMORANDUM

I. *BASIC FACTS.* This is a lawsuit brought on behalf of Southwest Kenworth, Inc. against the Arizona State Tax Commission concerning certain taxes which previously had been paid by plaintiff under protest. Plaintiff had a protest hearing previously before the Arizona State Tax Commission which affirmed the decision of that board in assessing the tax in the first instance. By virtue of statutory authority established for appeal purposes, plaintiff instituted the present action in the Superior Court to test the legality of the tax assessment. On May 23, 1973, this cause came on regularly for trial to a jury. Evidence was submitted by both parties on May 23, 1973 and May 24, 1973. At the termination of the factual evidence presented, certain Interrogatories were submitted to the jury with their Answers to be discussed hereinafter. At this juncture, counsel stipulated and the Court so ordered on June 4, 1973 that upon plaintiff's receipt of the transcript of testimony of Mr. Lee Crayton, plaintiff would have 20 days within which to file a trial memorandum, and that defendant would thereafter have 20 days within which to respond, and plaintiff finally having ten days thereafter within which to further respond. Plain-

tiff received the transcript of Mr. Crayton's testimony on Monday, June 11, 1973. The following will constitute plaintiff's analysis of the evidence presented to date, with a complete discussion of the existing case law on the subject, and the request that this Court decide as a matter of law that the transactional privilege tax involved was illegally assessed against the plaintiff, Southwest Kenworth, Inc.

II. *FACTS IN DETAIL.* It is undisputed that during the years of 1966 and 1967, plaintiff corporation was engaged in the business of heavy equipment distribution. In regard to this particular business pursuit, Southwest Kenworth, Inc. was a franchise dealer for KW-Dart Corporation which manufactured heavy duty type trucks in Kansas City, Missouri. The particular purchasers of trucks in this instance were American Smelting and Refining Company and Kennecott Copper Corporation, both corporations having mining operations within the State of Arizona. In this case, the trucks which were eventually purchased by American Smelting and Refining Company (hereinafter referred to as "ASARCO") and Kennecott Copper Corporation (hereinafter referred to as "Kennecott") were a special off-highway type vehicle which were intended for ore haulage purposes and had to be made according to specifications of the purchaser.

As to ASARCO, it made an invitation for bids concerning a prospective purchase of 39 85-ton dump trucks in mid-1965. The offer for bids was made from the purchasing headquarters of ASARCO in New York City. Representatives of Southwest Kenworth, Inc. traveled to New York on numerous occasions to determine bid specifications and other financial data necessary to formulate a bid to be made to ASARCO per its invitation. The bid was eventually submitted to ASARCO by Southwest Kenworth, Inc. and was accepted by ASARCO in New York City. The contract according to the intentions of the parties was not only entered into in the State of New York but subsequent confirming documentation confirmed that the contract was subject to interpretation under the laws of the State of New York. The trucks in question were subsequently manufactured by KW-Dart Corporation in Kansas City, Missouri, and at the termination of the manufacturing process, representatives of ASARCO traveled to Kansas City, Missouri to inspect these trucks prior to shipment. They were in fact accepted by ASARCO representatives in Kansas City, Missouri at which point in time they were placed upon a common carrier, F.O.B. Kansas City. The undisputed facts further indicate that the purchaser, ASARCO, paid the freight insurance on the trucks in question from their shipment point in Kansas City, Missouri to their ultimate destination in Arizona. Southwest Kenworth, Inc. invoiced the ASARCO organization as of the time that they were accepted by ASARCO in Kansas City, Missouri and placed upon the common carrier. Upon arrival in Arizona, the trucks were assembled by either employees of ASARCO or employees of KW-Dart Corporation. Initial repair work on the trucks, if necessary, was performed by KW-Dart pursuant to their warranty contract on the trucks in question. Southwest Kenworth, Inc.'s followup contact concerning these trucks included repair work on a time and a materials basis.

As to the Kennecott purchase, the facts indicate that Kennecott purchased 11 trucks through Southwest Kenworth, Inc. in 1967. The procedure was essentially the same, i.e. the purchasing office for Kennecott was located in New York City. The invitation for bids was unsolicited and emanated from New York City. Representatives of Southwest Kenworth, Inc. traveled to New York City and spent many hours negotiating specifications as well as purchase price. It is recognized that some contact was had between employees of Southwest Kenworth, Inc. and employees of Kennecott in Arizona relative to Southwest Kenworth, Inc.'s preparation of a response bid. At any rate, a subsequent bid was submitted to Kennecott by Southwest Kenworth, Inc. in the

State of New York where it was accepted. It was the intention of both parties to that transaction that the sale would take place in Kansas City, Missouri and title would transfer from KW-Dart to Southwest Kenworth, Inc. in Kansas City, Missouri. In fact, as the facts disclosed at the time of trial, the specifications were sent to KW-Dart in Kansas City where the trucks were manufactured. At the termination of the manufacturing process, employees of Kennecott traveled to Kansas City, Missouri where they inspected the trucks prior to shipment. They were shipped F.O.B. Kansas City with Kennecott paying the insurance costs concerning potential property damage to the trucks during their trip to the State of Arizona. When the trucks were placed on the common carrier in Missouri, Southwest Kenworth, Inc. invoiced Kennecott for those 11 vehicles. The followup procedure was basically the same as that described regarding the ASARCO purchase.

Plaintiff did not pay a transactional privilege tax upon the above transactions at the time. However, on March 26, 1969, the State Tax Commission completed an audit of the records of plaintiff for the period of April 1, 1966 through January 31, 1969. At the Commission's meeting of April 9, 1969, the Commission, based on said audit and a "corrected assessment", made an additional assessment against the plaintiff as to the above transactions in the sum of $177,387.41. Notice of this additional assessment was given plaintiff by letter of the Commission dated April 9, 1969. Thereafter, plaintiff had filed its timely petition for hearing on said assessment pursuant to A.R.S. § 42-1338(A). A hearing was duly held thereon before the Commission on September 26, 1969. By letter of the Commission dated May 25, 1971, the Commission advised plaintiff that on May 17, 1971, the Commission had denied plaintiff's application for a reduction in the additional tax allegedly due. Thereafter, plaintiff paid the additional assessment under protest. The action heretofore held before this

Court pertained only to the above referenced sale of earth movers to ASARCO and Kennecott. There was an additional assessment made by the Arizona State Tax Commission which has not been referenced in this memorandum. By stipulation of counsel, we have deferred presenting this matter to the Court with the understanding that the questions of law involved are presently being litigated in Pima County, Arizona and that both counsel wish to await the outcome of that proceeding in the hopes of expediting that remaining issue. At any rate, both parties to this action request only to litigate the question of the taxability of the sale of the earth movers above mentioned.

III. *FACTS PRESENTED AT TRIAL.* Three exhibits were introduced at the time of trial by plaintiff, i.e. the three purchase contracts involved in the sale of the earth moving equipment to Kennecott and ASARCO. Further, plaintiff introduced evidence through the trial's lone witness, Mr. Lee G. Crayton, President of Southwest Kenworth, Inc. The salient portions of Mr. Crayton's testimony may be summarized as follows:

1. He has been acquainted for a number of years concerning the customs in the trade relative to how earth moving equipment is sold to mining companies in Arizona, such as Kennecott and ASARCO (Crayton deposition, page 5).

2. Southwest Kenworth, Inc. is a heavy duty truck sales agency for both highway and off-highway type vehicles which are going to be used primarily for ore extraction purposes (Crayton deposition, pages 5, 6).

3. The trucks involved are all specially built for the particular pit in which they are to be operated (Crayton deposition, page 6).

4. Southwest Kenworth, Inc., during 1966 and 1967, was a franchise dealer for KW-Dart, the latter manufacturing trucks in Kansas City, Missouri (Crayton deposition, page 7).

5. In 1966, Southwest Kenworth, Inc. had approximately 50 employees in Arizona (Crayton deposition, page 9).

6. ASARCO's corporate headquarters and purchasing offices are located in New York City (Crayton deposition, page 10).

7. Mr. Crayton has been dealing with Kennecott since approximately 1952 (Crayton deposition, page 10).

8. As to the ASARCO purchase, Mr. Crayton testified that the purchasing offices of that corporation located in New York indicated in mid-1965 a need by ASARCO for an expansion of its fleet at the Mission Mine which is located outside of Tucson. After a review between Southwest Kenworth, Inc. personnel and management personnel from ASARCO, subsequently ASARCO issued an invitation for bids concerning its desire to purchase 39 85-ton dump trucks (Crayton deposition, pages 11, 12, 13).

9. Mr. Crayton was constantly in New York for this type of negotiation from mid-1965 until the contract was made (Crayton deposition, page 14).

10. As far as the negotiations were concerned, they were substantially performed in the State of New York (Crayton deposition, page 14).

11. The normal procedure in purchases of this sort is that the prospective bidder will meet with the mining people locally to discuss specifications prior to the submitting of a bid (Crayton deposition, page 17).

12. Southwest Kenworth, Inc., after talking with the mining people in Arizona about specifications, traveled to Kansas City, Missouri and discussed pricing of the vehicles with KW-Dart personnel (Crayton deposition, page 17).

13. The subsequent bid by Southwest Kenworth, Inc. was submitted in New York City (Crayton deposition, page 18).

14. After the bids were submitted, Mr. Crayton was advised by the purchasing agent for ASARCO that "the order was ours" (Crayton deposition, page 18).

15. Mr. Crayton considered that the contract was made in the State of New York (Crayton deposition, page 18).

16. The equipment was ordered F.O.B. Kansas City, Missouri, and the intention of the parties was that the interest in the equipment would pass and liability would also pass at Kansas City, Missouri when the trucks were loaded on railroad cars (Crayton deposition, page 20).

17. ASARCO subsequently paid for the rail expense from Kansas City, Missouri to the State of Arizona (Crayton deposition, page 24).

18. ASARCO paid the insurance on the trucks from Kansas City, Missouri to the State of Arizona (Crayton deposition, page 24).

19. After the trucks were completed, ASARCO sent a representative to inspect the trucks in order to determine if they were manufactured as ordered and to then authorize the trucks to be dismantled for shipment to the State of Arizona (Crayton deposition, page 25).

20. ASARCO personnel actually inspected or tested two or three of the vehicles in question in Kansas City, Missouri (Crayton deposition, page 25).

21. ASARCO was immediately invoiced when the trucks were loaded on the cars in Kansas City, Missouri (Crayton deposition, page 26).

22. Upon arrival in Arizona, the vehicles were assembled by mine personnel from ASARCO (Crayton deposition, pages 26, 27).

23. Any field problems during warranty period are taken care of by KW-Dart traveling field representatives (Crayton deposition, page 27).

24. As to the Kennecott purchase, the negotiation aspects were essentially the same as above referenced concerning ASARCO (Crayton deposition, pages 27, 28).

25. The bid that was accepted by Kennecott was accepted in New York (Crayton deposition, page 28).

26. The negotiation period leading up to the submitting of a bid to Kennecott extended over a period of four months in the State of New York (Crayton deposition, page 30).

27. Subsequently, the vehicles were manufactured and shipped F.O.B. Kansas City, Missouri with Kennecott paying transportation from Kansas City to Arizona (Crayton deposition, pages 30, 31).

28. Kennecott's master mechanic inspected the first two units before they were placed on the train in Kansas City (Crayton deposition, page 31).

29. The used trucks that were taken as trade depleted any anticipated gain in the contract because it took some five years to dispose of them (Crayton deposition, page 35).

30. If Southwest Kenworth, Inc. had thought that there was going to be a transaction privilege tax obligation in the State of Arizona, they could have run the transaction through their Kansas City, Salt Lake City or Albuquerque office; however, the advice that they received was that this particular type of transaction was not taxable in the State of Arizona, and therefore, it was done through the Phoenix office (Crayton deposition, page 37).

31. In 1966 and 1967, Southwest Kenworth, Inc. had approximately 100 employees of which 50 were employed in Arizona. Of those employees, 75% were in the service end of the business and 25% were in the accounting, sales and administration aspect of plaintiff's business (Crayton deposition, page 42).

32. The pre-bid contact by plaintiff's employees with mining employees concerning specifications usually involved one or two of plaintiff's employees (Crayton deposition, page 51).

33. Any repairs upon the purchased vehicles during the warranty period, if requested by KW-Dart, would be performed by plaintiff's employees at the expense of KW-Dart (Crayton deposition, page 51).

34. Mine personnel would reassemble the trucks at the mine site and this would consume approximately seven or eight man hours per truck by mine personnel (Crayton deposition, page 54).

35. When Mr. Crayton explained the procedure of ordering trucks from KW-Dart, he explained that initially, plaintiff's technical people go to the mines where they work out the needs of the prospective purchaser, and then plaintiff's employees go to Kansas City to the KW-Dart plant where they advise the engineering department as to exactly what is going to be built, and then the unit is priced from Kansas City (Crayton deposition, page 59).

IV. *FINDINGS OF THE JURY.* By special Interrogatory, the jury held that the sales in question were interstate in nature, although not completely disassociated from the activities of Southwest Kenworth, Inc. in the State of Arizona. Further, they held that the substantial elements of both contracts' sales negotiations took place outside of the State of Arizona, although they further held that the sales did not result from business activity conducted substantially outside of the State of Arizona. They further decided that the contract between plaintiff and both purchasers was entered into in the State of New York. They further held that all of the parties intended that title to the trucks would pass in Kansas City, Missouri. They were undecided as to where title in fact did pass in regard to these trucks. Surprisingly, although there was no support legally for their decision, they held that the sales did not take place outside of the State of Arizona. As will be pointed out in the paragraphs to follow, we submit that based upon the factual findings of the jury concerning the intentions of the parties and the general nature of the sales involved, as a matter of law, the transactional privilege tax assessed in this matter was improper and without legal authority.

V. *THE LAW*. The particular statute with which this case deals is A.R.S. § 42-1312 concerning the tax on tangible personal property. As of the time in question, it read as follows:

> "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person *engaging or continuing within this state in the business of selling* any tangible personal property whatever at retail . . ." (Emphasis Added)

The definition statute, i.e. § 42-1301(11) defines "sale" as follows:

> "11. 'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes: . . ."

We submit that it is essential for this Court to immediately accept the rationale that the ability to tax in this particular instance is derivative entirely from the specific wording of the statute involved. Therefore, we submit at the outset that there were two criteria which were essential to the imposition of the tax herein involved, i.e. (1) a sale, and (2) the engaging or continuing within Arizona in the business of such selling. From a reading of the facts presented at the time of trial, it is apparent that there was no "sale" in the State of Arizona in this particular instance.

As a further preliminary consideration, the Court will recall that counsel for the State did admit in chambers that many of the United States Supreme Court decisions are directed at the question of due process and the applicability of the commerce clause of the United States Constitution. Counsel for the State admitted that the United States Supreme Court decisions basically announce *how far* a state may go in its taxation process without running afoul of the federal due process, etc. restrictions. In our case, we need not go so far as the issue of taxability may be decided based upon a reading of the statutes above referenced, as well as the court decisions which have been rendered therefrom.

In the paragraphs to follow, undersigned counsel will attempt to summarize the law which has been established *in the State of Arizona* on the question of whether or not certain circumstances allow the imposition of the transactional privilege tax. A good starting point is the case of *Goodyear Aircraft Corporation v. Arizona State Tax Commission*, 1 Ariz.App. 302, 402 P.2d 423 (1965). In that decision, the Court was faced with a fact situation where Goodyear fabricated and sold dirigible envelopes as spare parts to the United States Department of Navy. The Navy placed, and the taxpayer accepted, the order at taxpayer's home office in Akron, Ohio. While the fabric for the envelopes was supplied from Ohio, the envelopes were actually manufactured in Litchfield Park, Arizona. In holding that the *sales* involved were made outside of the State of Arizona and therefore not subject to the transactional privilege tax, the Court stated as follows:

> "The question presented is whether the sales were made within the State of Arizona, and therefore taxable under A.R.S. § 42-1309 and § 42-1301, subsec. 14, or whether the sales were made either outside the State of Arizona or in interstate commerce. In either of these latter events the plaintiff would not be subject to the tax. The trial court found these sales were not sales within this state."

To stop at this particular point, we would submit that as a matter of law, since the jury in our present instance found that the sales were interstate in nature, the State of Arizona may not assess the tax as it did. To do so would run completely contrary to the decision in *Goodyear*.

However, one may find further reason for a denial of tax in this case by further reading the decision in *Goodyear*, supra. In that case, the Tax Commission had argued that the order was filled in Arizona and *title passed* to the Navy when the envelopes

were placed on the private carrier F.O.B. Litchfield Park. The Court, after quoting the above statute, stated:

> "First, we must look to the provisions of the contract to determine the intention of the parties and then to the facts regarding the transaction to ascertain where title transferred, and, therefore, the place of sale. . . .
>
> The terms of the contract and the facts establish that final inspection (being a total inflation test for constant pressure) took place at Lakehurst, New Jersey. . . .
>
> The intention of the parties, as reflected by the contract provisions, was that the sale (transfer of title) would take place in Lakehurst, New Jersey, after final inspection, acceptance and delivery."

In conclusion, the Court found:

> "We hold that title transferred in New Jersey and therefore, within the meaning of the above statute defining sale, that the sale occurred in New Jersey. Since the sale did not occur in the State of Arizona, the transaction is *not* subject to the Arizona tax for the reason that A.R.S. § 42-1312, subsec. A imposes a tax only upon those '. . . engaging or continuing *within this state* in the business of selling any tangible personal property whatever at retail . . .'" (Emphasis Added)

Applying the rationale of the *Goodyear* case to our present fact situation, it is submitted that as a matter of law, the tax could not be applied. Mr. Crayton testified that it was not only the intention of the parties that title pass in Kansas City, Missouri, but he also testified that from the point where the vehicles were placed on the rail in Kansas City, the *purchaser* paid freight to Arizona, and in addition, undertook the risk of loss to the equipment by (at its own expense) taking out property insurance on the trucks during their trip to this State. Further, Mr. Crayton testified that the "point of delivery" was the F.O.B. point, i.e. Kansas City, Missouri (Crayton deposition, page 23, lines 19-21).

Mr. Crayton further testified that the purchaser would pay for the trucks immediately after they were placed on the rail in Kansas City, Missouri. Further, the final inspection prior to accepting possession and risk of loss of this equipment was occasioned by employees of Kennecott and ASARCO going to Kansas City to inspect and test the vehicles before they were placed on the rail. By virtue of the criteria set forth in the *Goodyear* case, we submit that the "sale" took place outside of the State of Arizona for the following reasons:

1. Intention of the parties.
2. Final inspection prior to accepting title took place in Kansas City, Missouri.
3. Delivery and possession from seller to purchaser took place in Kansas City, Missouri.
4. The triggering event for payment by purchaser was acceptance of the goods in Kansas City, Missouri.
5. Since the transfer of title took place in Kansas City, Missouri, that was the place of sale. (A.R.S. § 42-1301[11])

The rationale contained in the *Goodyear* case was affirmed by the Court of Appeals, Division One, as recent as 1970. In *CF&I Steel Corporation v. State Tax Commission*, 11 Ariz.App. 80, 462 P.2d 97 (review denied February 10, 1970), the Court of Appeals specifically dictated that:

> ". . . And our courts have held that to be subject of the Transaction Privilege Tax the 'sale' must have taken place in Arizona."

Of extreme import in our present instance is the fact that the jury found that the sales were in interstate commerce. The following Arizona cases discuss the issue that certain transactions in interstate commerce are not subject to the transactional privilege tax. In a case involving a taxpayer who was operating both in interstate and intrastate commerce, the Arizona Supreme Court held the transactional privilege tax not applicable, even though

the products were required to be shipped, "knocked down" and assembled and installed by experts pursuant to a contract of purchase in Arizona. In *State Tax Commission v. Murray Company of Texas*, 87 Ariz. 268, 350 P.2d 674 (1960), vacated 81 S.Ct. 53, reaffirmed 89 Ariz. 61, 358 P.2d 167, the taxpayer was a Delaware corporation. It had its principal place of business in Dallas, Texas and manufactured cotton gins and prefabricated steel buildings which it sold in many states, including Arizona. It sold a number of gin repair parts to an Arizona firm. Plaintiff had as a sales representative in Arizona an individual who solicited orders from potential customers for cotton gins and steel buildings. The agent would transmit the orders to Fresno, California, a branch office, which would forward them to Dallas for acceptance. Delivery of the products was made to the customer in Dallas and billings and payments were received either in California or Texas. One of the terms of the contract was that taxpayer would provide an erector if desired by the customer. The buildings were not assembled until they arrived in Arizona. Certain equipment was sold to an Arizona resident by the salesman who resided in Arizona and actually performed work incident to the gin machinery if requested to do so by the purchaser. The salesman was paid by the Fresno office and reported to that office. The Tax Commission argued that these contracts with Arizona sufficiently localized the activities of taxpayer to bring them within the rule that taxpayer was doing business in this State. The Court disagreed with this argument and held that even though there were several local contacts, the sales under discussion did not transmute what would otherwise be a purely interstate transaction into an intrastate transaction subject to taxation. Another similarity in this case to the one under discussion is that taxpayer dealt with an Arizona corporation known as Food Machinery & Chemical Corporation that stocked gin repair parts. Food Machinery paid sales tax to the Commission on sales made

in Arizona. On remand from the United States Supreme Court, the Arizona Court restated its conclusion as follows:

> "(1) Plaintiff's [taxpayer] sales of gins and steel buildings were interstate and not intrastate transactions; (2) Plaintiff's other business activities did not convert such sales into intrastate transactions; and (3) As interstate transactions the questioned sales are protected by the interstate commerce clause of the Federal Constitution."

Undersigned counsel submits that the Court need not reach the question of whether or not the interstate nature of the sales herein involved precludes state taxation. We submit that the issue of taxability may be resolved by virtue of the fact that the sale involved did not take place inside the State of Arizona. If one were to follow the opinion of the legal office for the State Tax Commission as found in Attorney General Opinion 67-6 (February 6, 1967), one would be disposed to find in favor of plaintiff taxpayer. In that case, John M. Hazelett, a member of the State Tax Commission, had asked the Attorney General's Office whether the Arizona transaction privilege tax applied to the sale of "cast steel grinding balls manufactured in Arizona to a buyer engaged in business outside the State of Arizona for use in such buyer's out-of-state operation where the F.O.B. point was within the State of Arizona". In the Attorney General's Opinion, the following statements are made:

> "The statute imposing the applicable tax, which is A.R.S. § 42-1312, provides that the tax is upon every person engaging or continuing *within this State* in the business of selling any tangible personal property. Under A.R.S. § 42-1301(13), sale is defined as any transfer of title or possession or both of tangible personal property for consideration. Under these statutes, we need to determine whether or not the sale took place within the State of Arizona in order to determine whether the tax applies." (Emphasis Added)

The Court will note that this decision is right at the point in time involved in our present lawsuit. The Attorney General's Opinion went further, and after commenting upon the *Goodyear Aircraft Corporation* case, supra, held that:

> "The key consideration is the intention of the parties concerning the passage of title."

They also opined:

> "Ordinarily the F.O.B. point indicates the place of delivery and passage of title and thus where the sale occurs under our statutory definition."

Therefore, if one were to apply the rationale of the Attorney General's Office in the applicable years, the tax would never have been collected.

Additional grounds exist for the holding that the "sale" did not take place in the State of Arizona but in fact took place in the State of Missouri. The Court will recall that as to the ASARCO contract:

> "The validity, performance, construction and effect of this contract shall be governed by the law of the State of New York."

Thus, the law applicable to the construction of the ASARCO contract should be determined by § 187, Restatement 2d, Conflict of Laws:

> "(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."

Since the parties intended that title would pass in Kansas City, Missouri (and the jury so found), this should be dispositive of where the sale took place as to ASARCO.

Since no law was expressly chosen by the parties as to the Kennecott contract, the choice of applicable law is more difficult and must be determined by further analysis of the facts. We submit that even though the contract did not specifically provide that the contract's validity, performance and construction would be determined by the law of the State of New York, nevertheless the parties intended, and the jury so found, that title would pass in the State of Missouri. The Court so instructed the jury (Plaintiff's Requested Instruction No. 11) wherein the jury was told:

> "The place of sale in this case would be where the title or possession was transferred."

Further, in Plaintiff's Requested Instruction No. 12, the jury was told:

> "In determining where title or possession transferred in this case to American Smelting and Refining Company and Kennecott Copper Corporation, you must determine the intention of the parties so as to ascertain where the title or possession was intended to be transferred."

We submit that the decision of the jury is clear that title in fact did pass in Missouri and therefore that is where the sale took place. Defendant's position on this matter appears to be one of avoidance. That is, defendant takes the position that it is not necessary that "the sale" take place within the State of Arizona, but it is sufficient for Arizona to tax under the applicable statute if Arizona has some minimal contact with the entire transaction. We submit that based upon the above referenced statutes which have not been overruled nor have they been modified, counsel cannot make such a legal conclusion.

In closing, undersigned counsel wishes to bring the Court's attention to a December, 1972 United States Supreme Court decision. The case is *Evco v. Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico*, 34 L.Ed.2d 325,

93 S.Ct. ..... The tax involved in this litigation was New Mexico's emergency school tax and its gross receipts tax. These taxes were levied on the total proceeds received by a domestic corporation under certain contracts entered into outside of the state with out-of-state clients for the creation and design of insructional programs. Under these contracts, the taxpayer created within the state a finished product and then delivered such finished product to its out-of-state clients. The taxpayer appealed the assessment to the Court of Appeals of New Mexico, which ruled that although the taxes were imposed on the proceeds of out-of-state sales of tangible personal property rather than on receipts from sales of services performed within New Mexico, nevertheless such taxes were not an unconstitutional burden on interstate commerce. The Supreme Court of New Mexico declined to review this judgment. On the initial application for certiorari, the United States Supreme Court vacated the judgment and remanded the case to the Court of Appeals of New Mexico for reconsideration in light of the State Attorney General's concession that the state could not validly tax the receipts from sales of tangible personal property outside the state. On remand, the Court of Appeals of New Mexico reinstated and reaffirmed its prior opinion that such receipts could be validly taxed. The Supreme Court of New Mexico subsequently declined to review the case.

On certiorari, the United States Supreme Court reversed. In a per curiam opinion expressing the unanimous view of the court, they held that: (1) although a state could, consistent with the commerce clause of the Federal Constitution, validly tax proceeds from services performed by the taxpayer within the taxing state, even though they were sold to purchasers in another state, nevertheless a state tax levied on the taxpayer's gross receipts from sales of tangible personal property in another state was an impermissible burden on commerce, and (2) the Supreme Court would accept the state court's finding that the New Mexico taxes were

imposed on sales of tangible personal property in another state, rather than receipts from services performed by the taxpayer within New Mexico.

We feel that the above decision is dispositive in and of itself of our present litigation. We submit that as a matter of law, the Arizona tax in question was improperly assessed.

DATED this 28th day of June, 1973.

DUNN, TEILBORG, SANDERS,
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Honorable Roger G. Strand
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KAREN COOK

Appendix E

In the Superior Court of the State of Arizona
In and For the County of Maricopa

Southwest Kenworth, Inc., an Arizona corporation, Plaintiff, vs. Arizona State Tax Commission, a body corporate and politic, and John M. Hazelett, Waldo L. DeWitt, and Bob Kennedy, as members of and constituting said Arizona Tax Commission, and the State of Arizona, Defendants.	No. C250816

COMPLAINT

COMES NOW the plaintiff, by its attorneys undersigned, and for claim against defendants, alleges:

I

Plaintiff is a duly organized and existing Arizona corporation qualified to do, and doing, business in the State of Arizona. Defendant, ARIZONA STATE TAX COMMISSION, is a body corporate and politic, a political agency of the State of Arizona. Defendants JOHN M. HAZELETT, WALDO L. DEWITT, and BOB KENNEDY are residents of Maricopa County, Arizona, and are duly elected and acting members of the Arizona State Tax Commission (hereinafter sometimes referred to as the "Commission") who have and exercise the authority to administer the Excise Revenue Act of 1935, as amended (hereinafter sometimes referred to as the "Act"), being Arizona Revised Statutes, Title 42, Chapter 8, Article 1. (A.R.S. § 42-1301 et seq.)

II

This action is brought by and under A.R.S. § 42-1339 to recover certain taxes paid under protest by plaintiff, which plaintiff alleges were illegally assessed and levied against it by defendants.

III

On March 26, 1969 the Commission completed an audit of the records of plaintiff for the period April 1, 1966 through January 31, 1969, summarized in a document entitled "Corrected Assessment". At its meeting held April 9, 1969, the Commission, based on said audit and "Corrected Assessment" made an additional assessment against the plaintiff of $185,413.44. Notice of the additional assessment was given plaintiff by letter of the Commission dated April 9, 1969. A copy of said letter and a copy of said "Corrected Assessment" are attached hereto and made a part hereof by reference as Exhibit "A".

IV

Thereafter, plaintiff timely filed its petition for hearing on said assessment, pursuant to A.R.S. § 42-1338A. A hearing was duly held thereon before the Commission on September 26, 1969. By letter of the Commission dated May 25, 1971 the Commission advised plaintiff that on May 17, 1971 the Commission had denied plaintiff's application for a reduction in the additional tax allegedly due. A copy of plaintiff's petition and a copy of the Commission's letter are attached hereto and made a part hereof by reference as Exhibit "B".

V

Thereafter, on July 26, 1971, plaintiff timely paid said additional assessment, paying a part thereof, namely $52.59 without protest, and paying the balance thereof, namely $185,366.38 less the credit of $5.53 under protest pursuant to A.R.S. § 42-1339B. A copy of plaintiff's formal protest filed with the Commission on said date is attached hereto and by reference made a part hereof as Exhibit "C".

VI

This action has been timely brought within the period provided by A.R.S. § 42-1339B.

VII

The said additional assessment to the extent paid under protest is as aforesaid, namely in the amount of $185,366.38, is illegal for the following reasons:

1. *Sales in Interstate Commerce.* Items Nos. 1 and 2 of the Commission's "Corrected Assessment" purport to show as one basis for the additional assessment the following:

Items Effecting Additional Tax or Credit	Taxable Amount	Rate	Tax Liability
Disallowed Truck Sales to A S & R.....	4,241,554.50	3%	127,246.64
Disallowed Truck Sales to Kennecott Copper	1,671,359.13	3%	50,140.77

Taxpayer asserts that such sales are not subject to tax under the Arizona statutes for the reason that the same are sales in interstate commerce, exempt from taxation under Arizona statutes and the Constitutions of the United States and the State of Arizona and such sales were negotiated, consummated and made to a purchaser outside of the State of Arizona and were delivered and accepted by the purchasers outside of the State of Arizona and said items were at all times, from the initial contract until ultimate delivery, intended for transshipment and delivery, and were transshipped and delivered in interstate commerce. It is the taxpayer's position that the assessment on these items referred to above was erroneous and illegal in that the transactions upon which the tax is based were entirely out of the taxing jurisdiction of the State of Arizona and that the sales with respect to which the assessment was made were wholly within interstate commerce and that such assessment is prohibited by the commerce clause, due process clause, equal protection clause of the United States

Constitution and the Constitution of the State of Arizona and by A.R.S. § 42-1321A(4).

. . .

2. *Discrimination Against Taxpayer since the Sales were not Subject to Use Tax.* As to "Items 1 and 2", it is the taxpayer's position that since the buyers were not subject to the Use Tax of the State of Arizona because of the exemption found in A.R.S. 42-1409(8) being tangible personal property in the quantities and other specifications, including date of delivery, required by the purchasers, which, at the time of the purchase, was not available for purchase from the established place of business within this state which was engaged in the sale, from stocks within the state, of property of the same general specifications in the regular course of business. The exemption under the Use Tax provision of the Arizona Revised Statutes has no similar exemption in the Transactional Privilege Tax section. It is the position of the taxpayer that such an exemption in the Use Tax provision of the law discriminates against the taxpayer as a corporation duly incorporated and authorized to do business in the State of Arizona and is an unconstitutional attempt to exempt certain transactions from one portion of the taxing code while subjecting the same transaction to a different portion. This constitutional deprivation of equal protection of the law which pertains to the same transaction is on its face arbitrary, discriminatory and unreasonable and violative of the Arizona Constitution and the Constitution of the United States.

3. *Legislative Intent.* Effective July 1, 1968 machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes was exempt from the provisions of the Arizona Transaction Privilege and Use Tax. It is the position of the taxpayer that this statute indicates legislative intent for transactions occurring prior as well as after the enactment of this law. It is the taxpayer's position that the

legislature attempted to equalize the Arizona merchant with other out-of-state merchants and the legislative enacted exemption found in the present Arizona Revised Statutes clearly demonstrates the interpretation that should be placed upon the sale of machinery and equipment which is not available in this state prior to July 1, 1968.

4. *Replacement Parts—Items 3 and 4.* Items No. 3 and 4 of the Corrected Assessment pertain to additional taxes asserted based upon disallowed replacement parts sold to American Smelting & Refining Co. and to Phelps Dodge Corporation. These items are:

Items Effecting Additional Tax or Credit	Taxable Amount	Rate	Tax Liability
Disallowed Replacement Parts sold to A S & R	226,118.45	3%	6,783.55
Disallowed Replacement Parts sold to Phelps Dodge Corporation	39,847.41	3%	1,195.42

It is the taxpayer's position that the sales involved in both items 3 and 4 are exempt from taxation pursuant to A.R.S. 42-1312.01A.2 as:

> "Machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes, including equipment required to prepare the materials for extraction and the handling, loading or transporting of such extracted material to the surface. 'Mining' includes underground, surface and open-pit operations for the extraction of ores and minerals."

It is the taxpayer's further position that the inclusion of these items as taxable sales is arbitrary and discriminatory against the taxpayer since there has been no administrative rules or regulations established as to what items are exempt under the last quoted statute and that the inclusion of these items is clearly in contravention of the laws of the State of Arizona.

5. *Statute of Limitation, Waiver or Estoppel to Enforce Assessment.* It is the position of the taxpayer that the Commission has waived any right that it has to collect the alleged Corrected Assessment from taxpayer because of the failure of the Commission to promptly consider and rule upon the petition as provided in A.R.S. 42-1338 in that the Commission, from the hearing date in September 1969 until May 25, 1971 without good cause or reason, failed and totally refused to rule upon taxpayer's petition. It is the taxpayer's position that the delay caused prejudice to taxpayer, was in violation of the Arizona statutes and the Commission is estopped, has waived its right to attempt to collect the corrected assessment pursuant thereto. It is taxpayer's further position that the statute of limitations has run on Items 1 and 2 and, accordingly, the Commission is without rights to seek to enforce the Corrected Assessment.

6. *Other.* Taxpayer further reserves as grounds for protest, objections to any Commission's theory of taxation or to mathematical or accounting errors which have not heretofore been advanced by the Commission or been made evident in the Commission's audit as such may hereafter appear or be advanced for the first time.

VIII

Plaintiff reserves the right to plead further and/or amend its pleadings, to make applicable any and all of the above defenses or any new defenses or claim of mathematical or accounting errors which may be applicable to the Commission's basis for its action, to any new or different theories of taxation which may hereafter be made by the Commission, or to any mathematical or accounting errors not made evidence heretofore as plaintiff becomes aware of the exact nature of such basis.

WHEREFORE, plaintiff prays for judgment against the defendants in the amount of $185,366.38 together with interest at the rate of Six (6%) Percent per annum from the date of payment,

and for its costs herein expended, and for such other relief as the Court finds just.

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS

By JAMES H. O'CONNOR
James H. O'Connor
1800 First Federal Savings Bldg.
Phoenix, Arizona 85012
Attorneys for plaintiff

EXHIBIT "A"

State Tax Commission of Arizona
State House
Phoenix, Arizona 85007

April 9, 1969

WALDO DEWITT
Chairman

JOHN M. HAZELETT
Member

BOB KENNEDY
Member

V. L. NIELSEN, JR.
Executive Secretary

Southwest Kenworth, Inc.
L. G. Crayton, President
Paul Busch, Secretary
2211 West McDowell
Phoenix, Arizona 85009

Gentlemen:

This is to advise you that this Commission, at its meeting held on April 9, 1969 made an additional transaction privilege and education excise tax assessment, based on an audit made by this Commission, covering the period beginning April 1, 1966 and ending January 31, 1969 in the amount of $185,413.44. This notice is given as required by provisions of the Transaction Privilege and Education Excise Taxes, A.R.S. Title 42, Chapter 8, Article 1.

If you wish to apply to the Commission for a hearing, correction, or redetermination of the action taken, you are required under the law to present a petition in writing within thirty (30) days of your receipt of this notice setting forth the reasons why such hearing, correction, or redetermination should be granted, and the amount in which any tax should be reduced.

If you do not file such a petition within the required time, you shall be deemed and treated as waiving and abandoning any rights to question said amount.

This additional assessment becomes final thirty (30) days after your receipt of this notice, unless you petition the Commission in regard thereto, and if not then paid the amount of the additional assessment will bear interest at the rate of one-half percent per month or fraction of a month, until paid.

For any information regarding this audit, please contact Neal Trasente, Sales and Use Tax Director.

Very truly yours,

STATE TAX COMMISSION OF ARIZONA

By V. L. NIELSEN, JR.
V. L. Nielsen, Jr.
Executive Secretary

VLN/eb
Enclosure

EXHIBIT "A"

CORRECTED ASSESSMENT
(ARIZONA TRANSACTION PRIVILEGE (SALES) TAX
AND EDUCATION EXCISE TAX)
SOUTHWEST KENWORTH, INC.
L. G. CRAYTON, (PRES.)
PAUL BUSCH, (SEC'Y.)
2211 WEST McDOWELL
PHOENIX, ARIZONA 85009

PERIOD OF AUDIT:	LICENSE NO: 7-13110
4/1/66 thru 1/31/69	TYPE OF BUSINESS:
AUDIT COMPLETED:	Truck Sales
March 14, 1969	BASIS OF REPORTS:
BASIS OF AUDIT:	Gross Sales
Gross Sales	March 25, 1969

State Tax Commission
Capitol Building
Phoenix, Arizona

Gentlemen:

An audit for Transaction Privilege (Sales) Tax and Education Excise Tax purposes has been completed on the above account which discloses the following change in tax liability:

Total Tax Liability, Period of Audit	$436,865.11
Total Tax Paid, Period of Audit	251,451.67
Total Additional Tax Due	$185,413.44
Penalty (10% of Delinquent Tax Due, Period of Audit)	
Interest (½ of 1% per Month or Fraction of a Month)	
Total Amount Due	$185,413.44

Respectfully,

.....
Auditor

.....
Auditor

APPROVED BY STATE TAX COMMISSION OF ARIZONA

AUDIT APPROVED: .....
Director

THIS ..... DAY OF ..... 19.....

.....
Chairman

STATE TAX COMMISSION OF ARIZONA—
SALES AND USE TAX DIVISION
SOUTHWEST KENWORTH, INC.

SUMMARY OF AUDIT

License No. 7-13110

Gross Sales:		
New Truck Sales	$6,713,076.22	
Used Truck Sales	996,983.32	
New Earthmover Sales	6,636,663.63	
Used Earthmover Sales	198,500.00	
Asset Sales	1,395.00	
Shop Parts 4%	548,465.09	
Shop Parts 3%	634,329.74	
Shop Resales	30,879.18	
Shop Repair Labor	449,301.55	
Shop Supplies 4%	22,186.53	
Shop Supplies 3%	3,263.60	
Shop Supplies Resale	4,903.14	
Counter Parts 4%	875,908.64	
Counter Parts 3%	2,919,562.72	
Counter Parts Resale	337,503.71	
Counter Parts Out of State	741,094.73	
Counter Scrap Sales Resale	110.49	
Wrecker (Subject to 2½% Tax)	10,683.40	
Steam Cleaning	5,529.34	
Sublet Labor	72,295.65	
Sublet Parts 3%	9,432.36	
Sublet Parts 4%	32,378.36	
Sublet Resales	5,052.24	
Counter Parts Sales to A S & R	83,755.35	
Shop Parts Sales to A S & R	129,422.73	
Miscellaneous Sales (Taxable)	192.50	
Shop Scrap Sales Resale	737.88	
Reconditioned Parts	200.00	
Tax Collected	292,698.61	
Total Gross Sales		$21,756,505.71

STATE TAX COMMISSION OF ARIZONA—
SALES AND USE TAX DIVISION
SOUTHWEST KENWORTH, INC.

SUMMARY OF AUDIT (CONT'D)

License No. 7-13110

Deductions:			
Trucks Resale		$ 201,024.00	
Trucks Out of State		3,685,122.20	
Trade-Ins		524,886.35	
Trucks Exempt			
Sec. 42-1409 A S & R	$4,965,304.50		
Disallowed Trucks			
Exempt	4,965,304.50		
Trucks Exempt			
Kennecott	1,671,359.13		
Disallowed Trucks			
Exempt	1,671,359.13		
Earth Movers Out of State (Used)		157,500.00	
Repossessions		18,246.00	
Trade-Ins (Earthmover's)		723,750.00	
Shop Parts Resales		30,879.18	
Shop Repair Labor		449,301.55	
Shop Supplies Resale		4,903.14	
Counter Resales & Non-Taxables	337,503.71		
Less: Dissallowed:			
A S & R	12,940.37		
Phelps Dodge	39,847.41	284,715.93	
Counter Parts Out of State		741,094.73	
Counter Scrap Sales (Resale)		110.49	
Wrecker (Subject to 2½% Tax)		10,683.40	
Steam Cleaning		5,529.34	
Sublet Labor		72,295.65	
Sublet Resales		5,052.24	
Counter Parts Sales to A S & R Exempt	83,755.35		
Counter Parts Sales to A S & R Disallowed	83,755.35		
Shop Parts Sales to A S & R Exempt	129,422.73		
Shop Parts Sales to A S & R Disallowed	129,422.73		
Shop Scrap Sales Resale		737.88	
Tax Collected		292,698.61	
Total Deductions			7,208,530.69
Net Taxable Amount			$14,547,975.02

STATE TAX COMMISSION OF ARIZONA—
SALES AND USE TAX DIVISION
SOUTHWEST KENWORTH, INC.
SUMMARY OF AUDIT (CONT'D)

CLASSIFICATION OF TAXABLE INCOME AND COMPUTATION OF TAX LIABILITY

Retail Sales, Code 17	$14,547,975.02		
Taxable @ 2%		$290,959.50	
Tax Paid		167,385.61	
Additional Tax Due			$123,573.89
Education Excise Tax Due		$145,479.75	
Education Excise Tax Paid		83,692.79	
Additional Tax Due			61,786.96
Excess Tax Collected Due		$ 425.86	
Excess Tax Collected Paid		373.27	
Additional Tax Due			52.59
TOTAL ADDITIONAL TAX DUE PER AUDIT			$185,413.44

STATE TAX COMMISSION OF ARIZONA
SALES AND USE TAX DIVISION
AUDIT INFORMATION REPORT
SOUTHWEST KENWORTH, INC.
2211 WEST McDOWELL
PHOENIX, ARIZONA 85009

PERIOD: 4/1/66 thru 1/31/69 LICENSE NO.: 7-13110

AUDITOR'S COMMENTS:

Items Effecting Additional Tax or Credit	Taxable Amount	Rate	Tax Liability
1. Disallowed Truck Sales to A S & R	$4,241,554.50	3%	$127,246.64
2. Disallowed Truck Sales to Kennecott Copper	1,671,359.13	3%	50,140.77
3. Disallowed Replacement Parts sold to A S & R	226,118.45	3%	6,783.55
4. Disallowed Replacement Parts sold to Phelps Dodge Corporation	39,847.41	3%	1,195.42
5. Additional Excess Tax Collected Due			52.59
6. Miscellaneous Adjustments			5.53 Cr.
TOTAL AMOUNT DUE			$185,413.44

EXHIBIT "B"

May 25, 1971

Southwest Kenworth, Inc.
L. G. Crayton, President
Paul Busch, Secretary
2211 West McDowell
Phoenix, Arizona 85009

CERTIFIED

Gentlemen:

The Commission, having granted a hearing held on 26th day of September, 1969, upon your application for a reduction in the additional tax as shown in an audit covering the period April 1, 1966 to January 31, 1969, in the amount of $185,413.44, and having fully considered all matters presented by you, has the 17th day of May, 1971, denied your application. The order of the Commission becomes final thirty days after your receipt of this notice.

Should you desire to contest this assessment, it will be necessary for you to bring suit in a Superior Court on the State within sixty days after receiving this notice, as required by Section 42-1339 A.R.S. 1956.

Very truly yours,

STATE TAX COMMISSION
OF ARIZONA

V. L. Nielsen, Jr.
Executive Secretary

VLN:gw
cc: Mr. James H. O'Connor, Attorney

EXHIBIT "B"

State Tax Commission of Arizona

State Tax Commission of Arizona,
vs.
Southwest Kenworth, Inc.,
License No. 7-13110

PETITION FOR HEARING

COMES NOW SOUTHWEST KENWORTH, INC., an Arizona corporation, by and through the undersigned, its attorneys, and hereby petitions the STATE TAX COMMISSION OF ARIZONA for:

1. A formal hearing before the STATE TAX COMMISSION OF ARIZONA to correct the additional Transactional Privilege and Education Excise Tax assessment made by the STATE TAX COMMISSION OF ARIZONA on or about April 9, 1969. The assessment was based upon an audit made by the STATE TAX COMMISSION OF ARIZONA for the period beginning April 1, 1966 and ending January 31, 1969 in the total amount of $185,413.44. This Petition is filed pursuant to A.R.S. § 42-1338(A).

2. It is the position of the taxpayer that a hearing should be scheduled and that the order of assessment previously made by the STATE TAX COMMISSION OF ARIZONA should be revoked in its entirety and that the Commission find that the taxpayer, SOUTHWEST KENWORTH, INC., does not owe any amount for Transactional Privilege and Education Excise taxes for the period beginning April 1, 1966 and ending January 31, 1969. The entire amount of $185,413.44 is disputed by the taxpayer.

3. The sales in question out of which the additional assessment arose may be divided into two categories. In late 1965 and early 1966 SOUTHWEST KENWORTH, INC. entered into a

contract with American Smelting and Refining Company, 120 Broadway, New York, New York for the purchase by American Smelting and Refining Company of heavy duty mining equipment and more specifically, 39 trucks, Rear End Dump, KW-Dart Series D-2661, 85 Ton capacity according to the specifications by the Purchaser's Contract for the net price of $4,241,554.50.

In 1967 SOUTHWEST KENWORTH, INC. entered into a contract with KENNECOTT COPPER CORPORATION, General Purchasing Department, 161 East 42nd Street, New York, New York for the purchase of 11 KW-Dart 85 Ton End Dump Trucks for the net price of $1,671,359.13.

Both of these transactions have now been included in the corrected audit referred to above as sales subject to the Transactional Privilege Tax of the State of Arizona. As indicated below, it is the position of the taxpayer that neither sale was subject to the Transactional Privilege Tax of this state.

Category 2 involves the disallowance of certain sales made to American Smelting and Refining Company in December, 1968 and January 1969. The amount of tax in dispute on these sales is $6,783.55. The buyer claimed an exemption under the Machinery and Equipment Exemption found in A.R.S. § 42-1312.01, as amended, and the seller was informed that the parts and equipment sold were used directly in the process of extracting ores or minerals from the earth for commercial purposes.

Also, in November 1968 certain sales were made to Phelps Dodge Corporation of machinery and equipment and the tax amount in dispute is $1,195.42. The purchaser informed the seller that the parts were exempt pursuant to A.R.S. § 42-1312.01, as amended, as machinery and equipment used directly in the process of extracting ores and, therefore, exempt from the Transactional Privilege Tax of the state of Arizona.

4. For purposes of this Petition, the above mentioned sales will be referred to as Category 1 and Category 2 with the sale of

the heavy duty mining equipment being classified as Category 1, and the sale of parts and equipment to the mining companies defined as Category 2.

It is the position of the taxpayer that the transactions involved in Category 1 are not taxable under the Arizona Revised Statutes for the following reasons:

(a) The sales involved were sales in interstate commerce and prohibited from being taxed by the Constitution of the United States and the Constitution of the state of Arizona pursuant to A.R.S. § 42-1321(A)(4). The facts involving these sales are that in 1965 and 1966 negotiations were carried on with each of the buyers to acquire the equipment involved. The negotiations took place in the state of New York and representatives of the taxpayer made numerous trips to the state of New York to confer and make arrangements to bid on the acquisition of these trucks by the respective buyers. Thereafter, the Purchasing Departments of the two buyers involved, from their home offices in New York, submitted bid application forms to the taxpayer as well as other suppliers of this equipment in Arizona and other states. The taxpayer submitted its bids on the equipment involved based upon the specifications and requirements in the bid order. The bid of taxpayer was accepted in the state of New York by the respective buyers and the Order for Purchase was issued from the Purchasing Departments of the buyers in the state of New York. The Orders were forwarded to taxpayer in Arizona and since the equipment was not available in this state, the taxpayer placed the order with the manufacturer in Kansas City, Missouri. The trucks were built to specification in Kansas City, Missouri and shipped to the buyers F.O.B., Kansas City. It is the position of the taxpayer under these facts that the sales were consummated in the state of New York, the contracts entered therein, the purchase Orders issued therefrom and it was the intent of all the parties that the sale be an interstate commerce transaction.

(b) Since the equipment ordered by the buyers was not subject to the Use Tax of the state of Arizona because of A.R.S. § 42-1409(8) being tangible personal property in the quantities and other specifications, including date of delivery, required by the purchaser, which at the time of purchase was not available for purchase from the established place of business within this state which was engaged in the sale, from stock within the state, of property of the same general specifications in the regular course of business. This exemption is found in the Use Tax provisions of the Arizona Revised Statutes and no similar exemption is found in the Transactional Privilege Tax section. It is the position of the taxpayer that such an exemption in the Use Tax Provision of the law discriminates against the taxpayer and is an unconstitutional attempt to exempt certain transactions from one portion of the taxing code while subjecting the same transaction to a different portion. The exemption permitted in the Use Tax provision of the Code discriminates against Arizona corporations while permitting large, out of state corporations to escape payment of their fair share of Arizona taxes. This unconstitutional deprivation of equal protection of the law which pertains to the same transaction is on its face arbitrary and unreasonable.

(c) The transactions in dispute will not arise in the future due to the change in the law by the Arizona Legislature in 1968. Effective July 1, 1968 machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes was exempt from the provisions of the Arizona Transactional Privilege and Use Tax. It is the position of the taxpayer that this statute indicates the legislative intent for transactions occurring prior as well as after the enactment of this law. The Legislature recognized that most of the equipment and machinery used directly in the mining industry was acquired by corporations from their offices which are located out of state and that the property was not available for acquisition in the state of

Arizona. Therefore, to equalize the Arizona merchant with other out of state merchants, the Legislature enacted the exemption found in the above statute to permit the transaction described above and to permit Arizona merchants to compete with out of state merchants in the sale of mining equipment and machinery.

5. Regarding Category 2 items, the taxpayer relies upon A.R.S. 42-1312.01 once again as machinery or equipment used directly in the mining industry for commercial purposes and, therefore, the replacement parts are not subject to the Arizona Transactional Privilege Tax. An examination of the Purchase Orders, which are available in the file of this case, will indicate that in each instance the seller was informed by the purchasers that the transaction was exempt from both the Transactional Privilege Tax and the Arizona Use Tax pursuant to the above quoted statute, and that they did not consider the items purchased as expendable items. It is the taxpayer's understanding that there has not been a judicial nor commission interpretation of what is machinery and equipment as used in the Arizona statute nor has the term "expendable materials" been defined to date. In view of the controversy existing between the mining industry and the taxing authority and until such time as the specific terms or the law is changed by the Legislature, the taxpayer, to compete with other suppliers, has deemed it prudent from a business standpoint to exclude these sales from the reporting requirement of the Arizona Transactional Privilege Tax.

Based on the foregoing facts, taxpayer respectfully requests that the Tax Commission of Arizona grant a hearing and that the hearing be conducted at the convenience of the TAX COMMISSION OF THE STATE OF ARIZONA but that said hearing not be scheduled for a date earlier than August 1, 1969 because of the unavailability of certain witnesses and documents at this time. That after a hearing on the merits of this case, the STATE TAX COMMISSION OF ARIZONA redetermine the

tax involved and enter its Order finding that no additional Transactional Privilege Tax is due from taxpayer for the period involved in the audit.

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By .....

James H. O'Connor
1800 First Federal Savings Bldg.
Phoenix, Arizona 85012

EXHIBIT "C"

Before the Arizona State Tax Commission

Payment of Tax Under Protest and Protest of Southwest Kenworth, Inc., an Arizona corporation.

PROTEST

I

ASSESSMENT PROTESTED.

On March 25, 1969 the Commission completed an audit of the records of taxpayer for the period April 1, 1966 through January 31, 1969. The Commission issued thereon a Corrected Assessment showing an additional tax alleged due in the amount of $185,413.44.

At its meeting held April 9, 1969, the Commission based on said Corrected Assessment, made an additional assessment against taxpayer for said period in the audit amount of $185,413.44. Notice of this additional assessment was given taxpayer by Commission letter dated April 9, 1969. On June 13, 1969 taxpayer mailed to the Commission taxpayer's Petition for Hearing pursuant to A.R.S. § 42-1338A.

The Commission duly granted a hearing on said petition, which hearing was originally scheduled for August 15, 1969 and subsequently postponed until September 26, 1969.

By letter dated May 25, 1971 and received by taxpayer on May 27, 1971 the Commission notified taxpayer that said Petition for Hearing had been denied.

Taxpayer does not contest a portion of said additional assessment, namely the sum of $52.59 and the credit of $5.53 and therefore pays the $52.59 without protest, and claims the $5.53 as a credit.

Taxpayer's protest goes to the additional assessment based on the audit's "Item No. 1" relating to sales of trucks to American

Smelting & Refining Co.; to "Item No. 2" relating to sales of trucks to Kennecott Copper Corporation; "Item No. 3" relating to sales of replacement parts sold to American Smelting & Refining Co.; and "Item No. 4" relating to sales of replacement parts sold to Phelps Dodge Corporation.

NOW, THEREFORE, pursuant to A.R.S. § 42-1339B, Taxpayer, Southwest Kenworth, Inc., an Arizona corporation, herewith pays *under protest* the sum of $185,366.38 additionally assessed by the Commission against taxpayer and sets forth herewith, verified by oath, its grounds of objections to the legality of said tax:

GROUNDS OF OBJECTION

1. *Sales in Interstate Commerce.* Items Nos. 1 and 2 of the Commission's "Corrected Assessment" purport to show as one basis for the additional assessment the following:

Items Effecting Additional Tax or Credit	Taxable Amount	Rate	Tax Liability
Disallowed Truck Sales to A S & R.....	4,241,554.50	3%	127,246.64
Disallowed Truck Sales to Kennecott Copper	1,671,359.13	3%	50,140.77

Taxpayer asserts that such sales are not subject to tax under the Arizona statutes for the reason that the same are sales in interstate commerce, exempt from taxation under Arizona statutes and the Constitutions of the United States and the State of Arizona and such sales were negotiated, consummated and made to a purchaser outside of the State of Arizona and were delivered and accepted by the purchasers outside of the State of Arizona and said items were at all times, from the initial contract until ultimate delivery, intended for transshipment and delivery, and were transshipped and delivered in interstate commerce. It is the taxpayer's position that the assessment on these items referred to above was erroneous and illegal in that the transactions upon which the tax is based were entirely out of the taxing jurisdiction of the

State of Arizona and that the sales with respect to which the assessment was made were wholly within interstate commerce and that such assessment is prohibited by the commerce clause, due process clause, equal protection clause of the United States Constitution and the Constitution of the State of Arizona and by A.R.S. § 42-1321A(4).

2. *Discrimination Against Taxpayer since the Sales were not Subject to Use Tax.* As to "Items 1 and 2", it is the taxpayer's position that since the buyers were not subject to the Use Tax of the State of Arizona because of the exemption found in A.R.S. 42-1409(8) being tangible personal property in the quantities and other specifications, including date of delivery, required by the purchasers, which, at the time of the purchase, was not available for purchase from the established place of business within this state which was engaged in the sale, from stocks within the state, of property of the same general specifications in the regular course of business. The exemption under the Use Tax provision of the Arizona Revised Statutes has no similar exemption in the Transactional Privilege Tax section. It is the position of the taxpayer that such an exemption in the Use Tax provision of the law discriminates against the taxpayer as a corporation duly incorporated and authorized to do business in the State of Arizona and is an unconstitutional attempt to exempt certain transactions from one portion of the taxing code while subjecting the same transaction to a different portion. This constitutional deprivation of equal protection of the law which pertains to the same transaction is on its face arbitrary, discriminatory and unreasonable and violative of the Arizona Constitution and the Constitution of the United States.

3. *Legislative Intent.* Effective July 1, 1968 machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes was exempt from the provisions of the Arizona Transaction Privilege and Use Tax.

It is the position of the taxpayer that this statute indicates legislative intent for transactions occurring prior as well as after the enactment of this law. It is the taxpayer's position that the legislature attempted to equalize the Arizona merchant with other out-of-state merchants and the legislative enacted exemption found in the present Arizona Revised Statutes clearly demonstrates the interpretation that should be placed upon the sale of machinery and equipment which is not available in this state prior to July 1, 1968.

4. *Replacement Parts—Items 3 and 4.* Items No. 3 and 4 of the Corrected Assessment pertain to additional taxes asserted based upon disallowed replacement parts sold to American Smelting & Refining Co. and to Phelps Dodge Corporation. These items are:

Items Effecting Additional Tax or Credit	Taxable Amount	Rate	Tax Liability
Disallowed Replacement Parts sold to A S & R	226,118.45	3%	6,783.55
Disallowed Replacement Parts sold to Phelps Dodge Corporation	39,847.41	3%	1,195.42

It is the taxpayer's position that the sales involved in both items 3 and 4 are exempt from taxation pursuant to A.R.S. 42-1312.01 A.2, as:

> "Machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes, including equipment required to prepare the materials for extraction and the handling, loading or transporting of such extracted material to the surface. 'Mining' includes underground, surface and open-pit operations for the extraction of ores and minerals."

It is the taxpayer's further position that the inclusion of these items as taxable sales is arbitrary and discriminatory against the taxpayer since there has been no administrative rules or regulations established as to what items are exempt under the last quoted statute and that the inclusion of these items is clearly in contravention of the laws of the State of Arizona.

5. *Statute of Limitation, Waiver, or Estoppel to Enforce Assessment.* It is the position of the taxpayer that the Commission has waived any right that it has to collect the alleged Corrected Assessment from taxpayer because of the failure of the Commission to promptly consider and rule upon the petition as provided in A.R.S. 42-1338 in that the Commission, from the hearing date in September 1969 until May 25, 1971 without good cause or reason, failed and totally refused to rule upon taxpayer's petition. It is the taxpayer's position that the delay caused prejudice to taxpayer, was in violation of the Arizona statutes and the Commission is estopped, has waived its right to attempt to collect the corrected assessment pursuant thereto. It is taxpayer's further position that the statute of limitations has run on Items 1 and 2 and, accordingly, the Commission is without rights to seek to enforce the Corrected Assessment.

6. *Other.* Taxpayer further reserves as grounds for protest, objections to any Commission's theory of taxation or to mathematical or accounting errors which have not heretofore been advanced by the Commission or been made evident in the Commission's audit as such may hereafter appear or be advanced for the first time.

Respectfully submitted,

SOUTHWEST KENWORTH, INC.

By PAUL J. BUSCH
Paul J. Busch, Secretary

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS

By JAMES H. O'CONNOR
James H. O'Connor
Attorneys for Taxpayer
1800 First Federal Savings Bldg.
Phoenix, Arizona 85012

STATE OF ARIZONA
COUNTY OF MARICOPA—ss.

PAUL J. BUSCH, being first duly sworn, on behalf of the Taxpayer corporation, on oath states:

That he is the Secretary of Southwest Kenworth, Inc. and as such officer authorized to execute the foregoing Protest;

That he has read and knows the contents thereof and that the matters and things therein stated are true of his own knowledge except as to those matters therein stated upon information and belief, and as to such matters, he believes them to be true.

PAUL J. BUSCH
Paul J. Busch

SUBSCRIBED AND SWORN to before me this 26 day of July, 1971.

MARIA A. WATTIER
Notary Public

My commission expires:
December 13, 1974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1803

SOUTHWEST KENWORTH, INC., an Arizona corporation,

Petitioner,

vs.

ARIZONA STATE TAX COMMISSION, a body corporate and politic, and JOHN M. HAZELETT, WALDO L. DeWITT, and BOB KENNEDY, as members of and constituting said Arizona Tax Commission, and THE STATE OF ARIZONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

BRUCE E. BABBITT
Attorney General

JAMES D. WINTER
Assistant Attorney General
Attorneys for Respondents.

I N D E X

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The respondents herewith respond in opposition to the Petition for Writ of

Certiorari filed by the petitioner. It is the respondents' position that, contrary to the petitioner's assertions, the ruling of the court below upholding the imposition of the Arizona transaction privilege and education excise taxes in no way conflicts with this Court's holdings in Evco v. Jones, 409 U.S. 91 (1972) or American Oil Co. v. Neill, 380 U.S. 451 (1965). Rather, the lower court decision is entirely in keeping with this Court's decisions in Complete Auto Transit, Inc. v. Brady, ___ U.S. ___, 97 S.Ct. 1076 (1977) and Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560 (1975). The thrust of the petitioner's claim herein is that this Court's rulings in Evco v. Jones, supra, and American Oil Co. v. Neill, supra, forbid the imposition of the taxes in question under Article I, Section 8, Clause 3 of the U.S.

Constitution. The petitioner also alleges a denial of its due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution.

In the Evco case, supra, New Mexico's Emergency School Tax and Gross Receipts Tax were invalidated as applied to the receipts from certain sales of tangible personal property. However, the opinion makes it clear that the reason that the taxes there constituted an impermissible burden upon interstate commerce was because of the New Mexico Court of Appeals' findings. While the New Mexico Attorney General argued that the taxes were imposed upon income resulting from intrastate services rendered by the taxpayer, the New Mexico Court of Appeals disagreed. It rejected any distinction between the taxes as imposed upon income arising from a contract of sale or from a contract for

services. See Evco v. Jones, 83 N.M. 110, 112, 488 P.2d 1214, 1215-16 (1971).

This Court held that the New Mexico court had found that the manufactured items of tangible personal property were the sine qua non of the contracts and that it was the sale of those items in other states that had been taxed. Since the New Mexico court had approved the imposition of a tax directly upon the proceeds of the out-of-state sales of tangible personal property, the taxes were invalidated.

In the case sub judice, on the other hand, the Arizona Court of Appeals made it perfectly clear that, under Arizona law, the taxable activity is the privilege of engaging in business in Arizona rather than the sale transaction itself. (See Petitioner's Brief, Appendix "A", pp.6-7). Based upon the record in this case, it cannot be logically argued that

the petitioner was not engaged in business within Arizona, a fact that petitioner concedes in its statement of the case. (See Petitioner's Brief, p. 3).

Thus, the problems recognized in the Evco case, supra, as well as in the J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) and Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) cases cited therein, do not exist in the instant case. This is particularly so with regard to the petitioner's contention that the risk of multiple taxation burdens requires the invalidation of the tax. (See Petitioner's Brief, p. 7). The Arizona Court of Appeals, citing this Court's decisions in Standard Pressed Steel Co. v. Washington Department of Revenue, supra; General Motors Corp. v. Washington, 377 U.S. 436 (1964) and Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951), correctly held that the petitioner had

the burden of establishing that the transactions in question so burdened interstate commerce. This the petitioner failed to do.

With respect to the petitioner's reliance upon American Oil Co. v. Neill, supra, there a Delaware corporation licensed to do business in Idaho was held exempt from an Idaho motor fuel tax levied upon dealers who received such fuels within Idaho. The bids for fuel were submitted from the taxpayer's offices in Salt Lake City, Utah and were accepted in Seattle, Washington, the fuel being sold F.O.B. Salt Lake City. However, the case makes it plain that all of the elements of the transaction took place beyond Idaho's borders and that the other minimal activities of the taxpayer in Idaho, which were completely unrelated to the sale transaction were insufficient to provide the

requisite "nexus" to permit the tax.

In the case at bar, quite the opposite is true. Not only does the petitioner concede that it is engaged in business in Arizona, the Arizona Court of Appeals found that the particular sales were not dissociated from the local business within the meaning of the Norton Co. case, supra. While the petitioner selects those aspects of the transactions that it contends establish the totally interstate nature of the sales, it ignores those aspects which establish the intrastate nature of the taxable event, viz., engaging in business in Arizona.

The Arizona Court of Appeals specifically found and the evidence reveals that Southwest Kenworth, Inc., is an Arizona corporation with its principal place of business in Phoenix, Arizona; that over one-half of the petitioner's

employees were located in Arizona; that the petitioner maintained a large parts and service operation in Phoenix to service equipment sold to customers after the manufacturers' warranties expired; that this parts and service operation was admitted by the petitioner to be a vital part of its business activities; and that petitioner's employees regularly visited their customers (e.g. the mines) to determine parts needs and to maintain good business relationships. (See Petitioner's Brief, Appendix "A", p.11). In addition, the record clearly demonstrates that the petitioner's employees who had connections with those aspects of the transactions occurring outside of Arizona were themselves Arizona residents. The taxpayer had no offices in either New York or Missouri and there is no indication in the record that the petitioner even had resident personnel in

those states.

Furthermore, with respect to the specific sales transactions in question, the evidence showed and the Court of Appeals found that the specifications for the trucks in question were worked out in Arizona between the petitioner's technical employees and mine company personnel; that the trucks were custom-made for use in each particular Arizona open-pit mine; that the purchase orders for the trucks were accepted at the petitioner's Phoenix office; that the invoicing and payment went through the petitioner's Phoenix office; and that final inspection and acceptance of the trucks occurred at the Arizona mine sites. (See Petitioner's Brief, Appendix "A", pp. 11-12).

In view of the foregoing facts, the respondent respectfully submits that there is more than ample support for the

lower court's ruling. As was stated in this Court's opinion in the Standard Pressed Steel decision, supra, 419 U.S. at 562, "... the question in the context of the present case verges on the frivolous."

Clearly, the situs of the substantial business activities which transpired herein was Arizona. None of the other states involved in the sales would have had jurisdiction to tax the petitioner's activities. Those out-of-state activities upon which petitioner places such great reliance were plainly incidental and tangential to its extensive business activities within Arizona. The petitioner's arguments as to lack of nexus, absence of apportionment and conjectural multiple taxation simply cannot withstand scrutiny under the Standard Pressed Steel decision, supra.

Moreover, the decision in Complete Auto Transit, Inc. v. Brady, supra, simply reinforces this conclusion. Although the petitioner dismisses this most recent decision of this Court as being inapplicable, even a brief examination of the ruling will reveal its pertinence. As footnote 6 of the opinion demonstrates (Complete Auto Transit, Inc. v. Brady, supra at 1078), this Court was well aware of the questions of nexus, discrimination, apportionment and relationship to state services. Similarly, although the Complete Auto Transit case, supra, had not yet been decided, the Arizona Court of Appeals was also aware of these issues and properly upheld the tax under, inter alia, the General Motors Corp. and Standard Pressed Steel cases, supra, cited in the aforesaid footnote 6.

In addition, the Complete Auto Transit case, supra, cites (97 S.Ct. at

1079, n. 8) Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940). Of materiality to the present dispute is this Court's ruling in the J. C. Penney case, supra, 311 U.S. at 444-445:

> "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."
>
> (Citations omitted)

In this regard, the issue was discussed by the Washington Court of Appeals in the Standard Pressed Steel case, supra, (10 Wash.App. 45, 50, 516 P.2d 1043, 1047 (1973), citing Dravo Corp. v. City of Tacoma, 80 Wash.2d 590, 599, 496 P.2d

504, 510 (1972)) thusly:

> "'The fact that the value which the gross receipts measure is, in large part, the result of activity outside the territorial limits of the taxing jurisdiction does not mean the gross receipts are not fairly related to the activity within the jurisdiction. There is no constitutional objection to resorting to extraterritorial elements in determining the measure of a tax.'"
>
> (Emphasis Court's; citations omitted)

In the case at bar, the petitioner has failed to demonstrate the special and important reasons required to justify the grant of its petition for certiorari under United States Supreme Court Rules, Rule 19. The petitioner has demonstrated no violations under either Article I, Section 8, Clause 3 or the Fourteenth Amendment. The lower court opinion rests upon a sound factual and legal basis and in no way conflicts with this Court's prior rulings upon which the petitioner relies.

CONCLUSION

For the foregoing reasons, the respondents pray that the instant petition for writ of certiorari be denied.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General

/s/ James D. Winter
JAMES D. WINTER
Assistant Attorney General
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1977, three copies of the MEMORANDUM FOR RESPONDENTS IN OPPOSITION were mailed postage prepaid to

DAVID L. HAGA, ESQ.
Jones, Teilborg, Sanders, Haga & Parks
1570 First National Bank Plaza
Phoenix, Arizona 85003
Attorneys for Petitioner

I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
Attorney General

/s/ JAMES D. WINTER
JAMES D. WINTER
Assistant Attorney General
Attorneys for Respondents

SUBSCRIBED AND SWORN to before me this 15th day of July, 1977.

/s/ Leone Hohman
Notary Public

My Commission expires:

March 19, 1980

[SEAL]